Case and Comment
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Problems of the Police Power

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THE decisions on the police power reflect the judicial view of the legitimate scope of legislation in establishing social control over private action. If the judiciary is to fulfil its allotted task in our constitutional system, it must give expression to the conservative forces that live in the community, and it may happen that changing ideals of social justice do not find immediate or unquestioning response in judicial opinion. In a popular form of government it is almost inconceivable that a conflict between the courts and the people should be more than a temporary phase of development; but while it lasts it is productive of misunderstandings and animosities. It is significant that the proposal to allow a popular vote on judicial decisions has been confined to decisions on acts passed under the police power, and the proposal, whatever may be thought of its merits, clearly indicates a widespread conviction that in determining the scope of public-welfare legislation the legislative judgment should not be bound by hard and fast constitutional limitations.

At the time when the terms of the typical American Bill of Rights were first settled there were two principal objects of constitutional limitations: the guaranty of political and religious liberty, and protection against the possible abuses of criminal procedure. The clauses bearing on these rights still predominate, while the apprehensions to which they owe their existence have practically disappeared. Until after the Civil War, constitutional controversy was almost absorbed by the struggle between states' rights and national sovereignty; and not even the prohibition laws of the fifties produced a clear-cut issue between legislative power and individual liberty. The widest possible economic freedom was demanded by the necessity of developing the resources of the country, and was conceded without question.

The new formulation of the guaranties of fundamental civil rights by the 14th Amendment, and their placing under Federal protection, occurred just before the beginning of a new era. From 1870 on, new issues of constitutional power begin to engage the attention of the courts, and economic legislation occupies the center of the stage. The first great question was the control of railroads; the second, the question of free-

dom of contract between capital and labor.

The Granger Cases settled the former question at once in favor of the legislative power, without even recognizing the principle, since accepted that regulation must stop short of confiscation (94 U. S. 113, 24 L. ed. 77 [1877]). The control over railroad rates was not, however, based specifically on the police power. Perhaps under the influence of the dominant school of political economy, which repudiated state control of purely economic interests as an unwarranted and disturbing interference with the natural laws of trade, "police" had come to be associated with the primary social interests of order, safety, and morals, with regard to which the legislative power was unquestioned. Public regulation of railroad rates was therefore justified by the newly established doctrine of a business affected with a public interest. It is noteworthy that the leading opinion in the Granger Cases was written with reference to grain elevator charges, and not with reference to railroad rates. The Supreme Court found sufficient reasons for treating the grain-warehousing business of Chicago as affected with a public interest. It did not, however, clearly define the characteristics of such a business, nor has it done so since. Moreover it threw out a suggestion that private business is not similarly subject to public control. While, therefore, the legislative control over railroads has become an established part of our public law, the larger problem of the power to regulate other business or industry in its economic aspects has been left unsettled. If the anti-trust legislation of the last decade of the century had a clear constitutional title, this is due to the fact that combinations in restraint were unlawful at common law, and the anti-trust acts did little more than further define and penalize this common-law illegality.

The claim of the power to control economic interests was more successfully assailed in connection with labor legislation. After a first decision in favor of the restriction of hours of labor of women (Com. v. Hamilton Mfg. Co. [1876] 120 Mass. 383), the doctrine of freedom of contract asserted itself from 1886 on, being introduced by rather extreme judicial rulings in Pennsylvania and Illinois (Godcharles & Co. v. Wigeman, 113 Pa. 431, 6 Atl. 354; Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631), and it has on the whole maintained itself since. Courts have even tentatively questioned whether the state might interfere to protect the laborer against his own willingness to assume risks of accident or disease (Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; Re Morgan, 26 Colo. 415, 77 Am. St. Rep. 269, 58 Pac. 1071, 47 L.R.A. 52), but this position could not be seriously maintained, and labor legislation for the protection of health and safety of the laborer in his work place, as well as the public at large, now passes unchallenged.

As a consequence of this qualified recognition of the police power, there has been a general effort in recent years to justify proposed or enacted labor legislation on the basis of safety, health, or morals. This effort has been most conspicuous and successful in the matter of the maximum work day for women; and, for the purpose of supporting the laws of Oregon and of Illinois, elaborate briefs were presented which marshaled facts and opinions drawn from governmental documents and scientific treaties to the almost entire exclusion of legal argument. And the police power as a power for the safeguarding of public health and morals is again put forward and relied upon in the minimum wage bills and statutes of the present year. It will be interesting to watch how far the power can be stretched on this narrow basis. The Supreme Court in the Oregon case (Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957) seemed willing to recognize a much wider legislative power on behalf of women; but conceding that an exceptional status may be claimed for them on strong historical and sociological grounds, the establishment of the doctrine of a sex specially subject to protective control would leave us as unenlightened with regard to the general scope of the police power as did the doctrine of a business specially affected with a

public interest, and women might find the one doctrine as distasteful as railroad companies have found the other.

Neither in Australia nor in England has minimum wage legislation been confined to women and persons under age, and male adult coal miners have obtained in England a legislative eight hours' day. It is, however, true that in Europe as well as in America legislation has on the whole refrained from meddling with the adult male laborer as regards wages and hours of labor, and the current of thought in Europe has, on the whole, not been very different from that which in America resulted in a denial of constitutional power to dictate the terms of his employment. The problem thus appears as a universal one: Is it possible to recognize a sphere of freedom of contract which is concerned with interests essentially different from the primary public interests of order, safety, and morals, and therefore entitled to immunity from legislative interference? Is it possible to separate the problem of wealth from other social problems? More specifically,—Can health and morals be adequately dealt with without regard to all other conditions of labor? Can the public remain neutral in wage contests which threaten to bring a section of the country to the verge of famine, or a section of a state to the verge of civil war? Or, starting from the doctrine of a business affected with a public interest, is it possible to deal justly with railroad rates without the power to deal with the wages of railroad employees? Can manufacturers resist advances in rates and claim that the state has no power to regulate prices of commodities? In short, is it possible to divide the public welfare into distinct compartments, some amenable to legislation, and others immune from it, or is not the police power coextensive with all legitimate public needs, as advancing social conditions and a growing social conscience develop them?

This is at present the fundamental problem of the police power, a problem the solution of which constitutional law may aid by a broad and genuinely historic spirit of construction, and which it may delay by hard and fast canons and categories, but which will be ultimately controlled and settled by economic and social, and not by legal, thought.

A future critical retrospect of the period of twenty-five or thirty years now apparently drawing to a close will probably condemn the attitude of the courts toward the police power in matters of labor legislation as constitutionally unsound and politically unwise. The impartial historian will, however, find an explanation of this attitude in the great difficulty of confining the exercise of the police power within legitimate bounds.

It is even now in many cases almost impossible to determine whether or not a measure is demanded by considerations of health or safety, and the agitation for a further reduction of hours of labor of women will have to face the difficulty of justifying itself on these grounds. If, however, legislative control is admitted on the broad and practically unlimited basis of social advancement or economic readjustment, what guaranty is there against the abuse of the police power for the furtherance of special or class interests parading, as they have always done, under the guise of the public welfare?

The equal protection clause of the 14th Amendment will, of course, be thought of at once as a possible weapon of defense against unwarranted class legislation. However, a study of the operation of this clause in the past must produce considerable skepticism as to its availability in the future. There are some states in which it plays a considerable part in the judicial overthrow of statutes, and Illinois is conspicuous in this respect. In that state, however, the application of the rule of nondiscrimination has been so capricious that the impossibility of foretelling what kind of classification for purposes of welfare legislation will stand the test of judicial scrutiny has become a notorious grievance. The Supreme Court of the United States, on the other hand, having applied the rule in one case (that of the anti-trust act of Illinois, Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431) with surprising strictness, has since practically taken

the position that a legislative classification will be sustained if there is any reasonable possibility of its justification, and in the last ten years no measure has been declared invalid by reason of undue partiality or discrimination. No jurisdiction has developed any constructive theory of classification which might serve for guidance or protection.

The reason for this failure is tolerably clear. The legitimacy or illegitimacy of classification can be established only on the basis of social or economic *data* of great complexity. It presents a question of fact for the examination of which the courts are not equipped. It is always a condition as well as a theory which underlies public welfare legislation; and while the courts can deal adequately with the theory, the condition must elude them unless it is notorious, and at present the causes of social or economic grievances are rarely notorious.

Conceivably this defect of judicial action might be overcome by new powers or facilities for independent inquiry placed at the disposal of the courts; but it is not likely that these will be resorted to if experience shows that the same function can be better performed by other organs. And the remedy appears to be coming from another direction. In an increasing number of cases important legislation is being prepared by commissions of inquiry composed of experts and having adequate resources for investigation at their command. The conclusions of such a commission will carry a weight which unfortunately has long ceased to attach to the mere fact of the enactment of a statute. The courts may of course still reject an act thus recommended; but the case of the workmen's compensation law of New York shows not merely with what unfeigned respect the work of such a commission will be commented on by a court, but also that public opinion will not be inclined to treat a decision adverse to its conclusions as final. A proper development of scientific methods of legislation will reduce the conflict between legislation and adjudication to a minimum.

A similar result may be expected from the growing legislative practice of delegating in appropriate cases powers of quasi legislative or quasi judicial determination to administrative commissions. It is now generally conceded that no other form of railroad control is adequate or satisfactory, and the superseding of the Massachusetts advisory railroad commission—for many years the model of its type—by the mandatory commission act of the present year, marks the final victory of this phase of railroad legislation. Again, the establishment of an industrial board in New York, likewise in the present year, and in pursuance of the recommendations of a notable commission, marks the adhesion of the leading state of the Union to a similar method of labor legislation, first introduced in Wisconsin. And it is note-worthy that of the minimum wage laws enacted during the year only one does not pursue the commission plan.

In proper hands and under proper safeguards the system of leaving to an administrative commission the development of principles laid down by the legislature in broad terms carries with it guaranties of reasonableness and impartiality which a political body can never afford. The system is based upon the theory that when once an agreement has been reached regarding the principle of a measure, the development of that principle into detailed rules is a process determined by the logic of ascertained facts. It thus represents a separation of that which is matter of choice or of expediency, *viz.*, the adoption of a policy, from that which is matter of argument and judgment; namely the application of the policy to particular circumstances. Viewed in this light the delegation constitutes not a violation, but a more perfect development of the principle of the separation of powers, and this should be borne in mind when the system is attacked as an unconstitutional delegation of legislative power. In any event, some such method of dealing with complex social and economic problems seems an almost indispensable corrective of the possible abuses of a police power extending to every interest that can be reached or affected by governmental action.

Ernst Freund

PEACE AND PROSPERITY

The Police Power

Its Indefinable Character a Potent Reason for Guarding the Manner of Selection and Independence of Those Whose Duty It is to Declare Its Scope.

BY HON. ANDREW J. COBB

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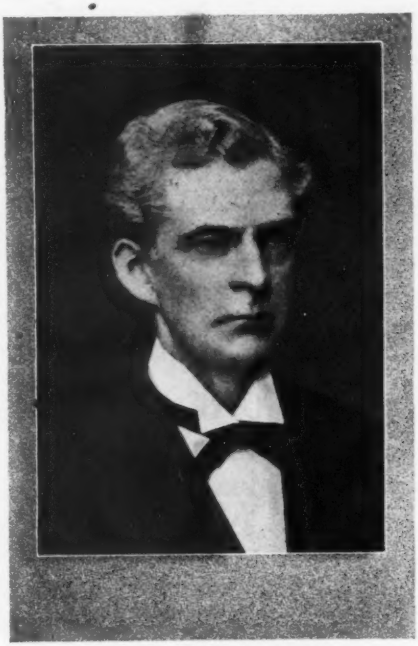
THE three indispensable powers of government are the taxing power, the power of eminent domain, and the police power. Government owes its life to the first, its ability to perform its functions to the second, and its orderly continuance to the third. Property is either taken or damaged when any one of these powers is exercised, but government never takes or damages property without compensation. The citizen cannot be required to surrender anything that he may own to the government without something being given in return by the government. The compensation given by the government is not the same in all cases. The manner in which it is given varies in different cases where a government sees proper to require of the citizen some portion of that which he owns and possesses. When the power of eminent domain is exercised the compensation is in money. When the citizen is deprived of property or a property right under the taxing or police power, the compensation received by the citizen is protection, health, peace, order, and the like. The line of demarcation between these powers is sometimes difficult of ascertainment, though the line between the power of eminent domain and the taxing power is more capable of exact designation than the line marking the difference between the power of eminent domain and the police power. One of the powers may be, for its complete exercise, dependent upon one of the others. The police power is sometimes dependent upon the taxing power. An inspection law, so far as it relates to the matter of

surveillance of the business of a citizen, has its foundation in the police power, but the fees which the citizen is required to pay to the inspector are really collected under the taxing power. Each of the powers is inherent in government. The limitations that may be placed upon the exercise of any of them are to be found either in Constitutions or statutes. The exercise of each must be derived from a legislative enactment, and the legislative enactment must be within the prescribed bounds of the Constitution. When there is no limit fixed in the Constitution, the question as to the limit and extent of the power is to be answered primarily by the legislature. Where the Constitution has spoken in reference to the subject, the question as to whether the legislative enactment is within the bounds of the Constitution is for determination by the courts.



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The police power as to its limits and extent is undefined and indefinable. This is so from necessity. It is through the exercise of this power that we have a guaranty of health, peace, order, and all of those things which make life and its enjoyment possible. The police power may have to be called into exercise in what may be considered the more trivial affairs of life, as well as in those of gravest importance. It is the power which can require the careless citizen to bury a dead fowl upon his premises. It may regulate men of the learned professions in the exercise of the duties of their professional calling when it relates to the health or property of the citizen. It may regulate the great carriers of the world as to the manner in which articles which are dangerous to life may be transported, and prohibit the carriage of those that are a menace to health. By it the limb that overhangs the highway may be cut off, and the edifice may be destroyed to prevent the spread of a conflagration. In its exercise the harmless drunken person may be removed from the street, and the place at which he secured his liquor in violation of law may be closed. We may obtain a view of the extent of the power by illustration, but its extent cannot be compressed within the bounds of a definition. The beneficent effects that result from its exercise are largely due to its indefinable character. There are some things which the law cannot afford to define. The moment that accurate definition appears, the hands of a wrongdoer are sometimes unloosed.

Is the police power then an arbitrary power? By no means. Its exercise is subject to limitations in the Constitution and is also subject to limitations by the legislature, and the enactment of the legislature is subject to review and revision by the courts. The legislature may prohibit those things which are prejudicial to the welfare of the public, or it may command those things which are promotive of the general welfare.

At last, however, what is or what is not in the domain of the police power is a judicial question.

What would not be a legitimate exercise of the power in one territory might

be a necessary exercise in another. What would have been considered an unauthorized exercise in an age that has passed may be a necessary exercise in a subsequent age. Its exercise depends upon general conditions, as well as local conditions. Changed conditions may make that necessary which under former conditions might have been properly held to be arbitrary.

The power has been coexistent with government itself. The extent of its exercise broadens or lessens as conditions change. The existence of the power, its indefinable character, the delicate task of declaring when its exercise is arbitrary or when property and personal rights are unduly interfered with, emphasizes the importance of an honest, intelligent, and independent judiciary, and is an answer to those who would make the judiciary subject to the possible influence of popular prejudice and caprice.

To the judicial department of the government is, therefore, committed the grave and important duty of deciding, from time to time, whether that which purports to be in the interest of the general welfare is really such. Such a power should be confided to men of character, men of learning, and men who are fully abreast of the times in thought. The precedents of the past may sometimes have to be disregarded on account of the conditions of the present. One who is not thoroughly imbued with the views of the present in regard to matters which must be considered in the determination of this question is not well qualified for the exercise of the duty of determining the scope of this power. The one who has this responsible duty must not be ultra-conservative so as to cling with undue tenacity to the past. On the other hand, he must not be ultra-progressive so as to declare that within the power when the conditions have not arisen that would justify such declaration. If the judges in whom this power resides are elected by a popular vote the insidious influence of such method of election is bound to have its effect, and in determining the scope of the police power popular prejudice may find an expression either too much limiting it or giving to it too broad scope. If the judges are chosen by the vote of the legislature the evils of popular election are to some extent lessened, though they are still present in a degree. The chief executive of a state is one who should be, and generally is, abreast of the times in which he lives, and to him may be confided the selection of these officers with more confidence of satisfactory results than any other method that has been adopted. It is true that this reposes the selection in a single person. This is one of the strongest reasons for this method of selection. He can be held responsible for a selection that was unwise or improper. The voters at the ballot box are an irresponsible mass. The voters in a legislature are a smaller mass, but there is a divided responsibility among a large number. The executive, the single person charged with a grave duty, can be identified and held responsible for his acts. The consciousness of this will generally bring him to the discharge of this duty in a state of mind where he will realize the gravity of the situation by which he is surrounded.

I was requested to write an article upon one phase of the police power, and I have digressed into a discussion of the method of selecting judges. The digression was easy, and I think it was logical. The manner of selecting those who are to determine the extent of the power is certainly a phase in the discussion of the power itself. However, let it stand as a digression. Sometimes that which is said in a digression is of more importance than what is said in a discussion of the main question, just as what is said in an opinion by way of *obiter* is sometimes more lasting and of more importance than what was said in the direct discussion of the main question.

Andrew J. Cobb.

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Public Opinion and the Police Power

BY HON. HORACE M. TOWNER

Representative in Congress.

IN Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168, it was argued that a constitutional provision of the state of California, which provided that all contracts for the sale of shares of the capital stock of any corporation on margin, or to be delivered at a future day, was void, being within the prohibition of the 14th Amendment to the Federal Constitution. The reason alleged was that the prohibition of all sales on margin bore no reasonable relation to the evil sought to be cured; to wit, the suppression of gambling. The Supreme Court upheld the law,—"being unwilling to declare that the deep-seated conviction on the part of the people concerned as to what was required to effect the purpose could be regarded as wholly without foundation."

HON. HORACE M. TOWNER

In Central Lumber Co. v. South Dakota, decision filed December 2, 1912, 226 U. S. 157, 57 L. ed. —, Adv. S. U. S. 1912, p. 66, 33 Sup. Ct. Rep. 66, it was held that a provision of the laws of South Dakota providing a penalty for selling goods at a lower rate in one place than in another, for the purpose of destroying competition, was within the police power of the state. In passing upon the question involved the Supreme Court said: "That the law embodies a widespread conviction appears from the decisions of other states" (citing cases).

In Purity Extract & Tonic Co. v. Lynch, decision filed December 2, 1912, 226 U. S. 192, 57 L. ed. —, Adv. S. U. S. 1912, p. 44, 33 Sup. Ct. Rep. 44, it was held that a statute of Mississippi which prohibited the sale of malt liquors was not obnoxious to the amendment. It was contended that, unless the liquor was intoxicating, the state had no power to prohibit sales. In refusing to recognize the validity of that contention, the Supreme Court said: "That the opinion is extensively held that a general prohibition of the sale of malt liquors, whether intoxicating or not, is a necessary means to the suppression of the trade in intoxicants, sufficiently appears from the legislation of other states and

the decisions of the courts in its construction. [citing cases.] We cannot say that there is no basis for this widespread conviction."

In these and other cases that might be cited, the Supreme Court of the United States considers and adopts the "deep-seated conviction on the part of the people." It approves and follows a popular opinion that is "extensively held." It takes into consideration and approves a "widespread conviction of the people."

In view of these marked instances of the judicial adoption of popular opinion, who can be heard to question the fact that the courts are near to the people? If, in the determination of the limits of the police power—that power which adapts itself to the changing needs and most closely touches the every-day life of the people—popular opinion of what is best to serve their interests is determinative with the courts, there is little to be desired in their closeness of touch with the citizen.

Just how far this may go, to what extent it may be carried, is a question impossible to determine; and this is one of many reasons why the police power is more than ever in these days so impossible to define or limit. Many years ago Chief Justice Shaw in his classic definition of the police power said: "It is much easier to perceive and realize the existence and the sources of this power than to mark its boundaries and prescribe the limits to its exercise." There is hardly a decision rendered now that interprets or applies the police power but is a new instance illustrating the truth of that statement.

MOUNTED POLICE CLEARING THE STREET

The Police Power of the States as Restricted by the Federal Constitution

BY ALBERT H. PUTNEY

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THAT poorly defined group of powers, known collectively as the police power, was among the powers which remained with the several states after the adoption of the Federal Constitution. The right to exercise such power is an absolute necessity for every government, and was never surrendered by the states to the national government.[1] The Constitution clearly contemplates leaving such a power to the states, and in general the Federal government has shown itself disposed to give a liberal interpretation to the extent of power allotted to the states under this right. The police power is so essential to a state government that it cannot deprive itself of the right to its future exercise, nor can it in any way relinquish it or bargain it away.[2] Neither can a state government grant away its police power to a corporation.[3]

"A state could not be a government, could not give protection to its people in return for their allegiance and taxes, did it not possess this police power; for upon it rests her entire criminal law, all law to protect life, limb, property, health, order, morals,—all the highest behests and wants of organized society."[4]

That this police power of the states, however, was curtailed to some degree by the adoption of the United States Constitution has been frequently asserted by the United States Supreme Court.

"Definition of the police power must, however, be taken subject to conditions that the state cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government or rights granted or secured by the supreme law of the land.[5] While it may be a police power in the sense that all provisions for the health, comfort, and security of the citizen are police regulations and an exercise of the police power, it has been said more than once in this court that where such powers are so exercised as to come within the domain of Federal authority, as defined by the Constitution, the latter must prevail."[6] "No urgency for its use can authorize a state to exercise it in regard to a subject-matter which has been confined exclusively to the discretion of Congress by the Constitution."[7]

The question of the police power of the states has been involved, directly or indirectly, in the great majority of the cases in which is found a conflict between the jurisdictions claimed respectively by the Federal and the state governments. From the extracts and from the decisions of the United States Supreme Court previously cited, it would appear that the police power of the states must yield in every case in which it is opposed to any of the powers granted

[1] Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154.

[2] Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989.

[3] Laurel Fork & S. H. R. Co. v. West Virginia Transp. Co. 25 W. Va. 324.

[4] Brannon's "The 14th Amendment," p. 169.

[5] New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 661, 29 L. ed. 516, 520, 6 Sup. Ct. Rep. 252.

[6] Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114.

[7] Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 271, 23 L. ed. 543, 548.

to the national government by the Federal Constitution. As a matter of fact, however, these *dicta* of the Supreme Court go considerably beyond the actual decisions rendered by this court.

The United States Supreme Court, which must always possess the final decision in controversies of this character, has taken, in the main, a very fair and unprejudiced attitude in controversies between the police powers of the states and the powers delegated to the Federal government. The Supreme Court has never laid down and followed any general rule of law as the test to be resorted to in such cases; probably any such general rule would often fail as a satisfactory test. The principle by which the Supreme Court has been largely influenced in such cases, although such a principle has never been set out by the Supreme Court in any of its decisions, seems to have been that of upholding the power for which there is found the greater necessity. Thus the court has generally upheld a particular police power of the state, when the right to exercise such power was of vital importance, to the state, and the infringement of the Federal power involved was not a matter of great importance to the nation. This principle, however, cannot always be followed. A law passed by a state cannot be sustained under the police power, no matter how important such law may be to the state, if it too clearly infringes upon the powers of the national government as granted by the United States Constitution. Thus in the decision of Leisy v. Hardin,[8] the court seemed to express its regret that it was obliged to assert the unconstitutionality of the state prohibition law, so far as it applied to liquors imported from another state and sold in the original package. A state statute, which is in conflict with some Federal statute properly passed under some power delegated to the United States by the Federal Constitution, can never be upheld as a proper exercise of the police power.

Probably the most important line of decisions relative to the police power of the states is that which relates to state regulations of interstate commerce.

In the decision in Gibbons v. Ogden[9] the doctrine was set forth that the power of the Federal government over interstate commerce was not only supreme, but also absolutely exclusive; that the power to regulate commerce was not one which, by its nature, was capable of being divided between two different governments; and that therefore any state law which attempted to regulate in any interstate commerce was unconstitutional and void.

It soon became apparent that the *dicta* in this case were too broad, and that some concession to the police power of the states must necessarily be made. What these concessions should be, where the line should be drawn, was a question which long defied settlement. Nowhere in all the reports of our Supreme Court can we find so much of uncertainty, so much of unscientific reasoning, so much of hair-splitting distinctions, so much of disagreements in opinions between the different members of the court, as in the line of commerce decisions rendered in the quarter of a century following Gibbons v. Ogden.

A few only of these decisions need be referred to. In the case of New York v. Miln[10] the question involved was the constitutionality of an act of the state of New York, which required the master of every passenger vessel from other states or foreign countries to make a report, relative to passengers carried by the ship on the voyage just completed, written twenty-four hours after the arrival of the vessel. Here was a direct conflict between the commerce power of the United States and the police power of the state, and the Supreme Court, evading the broad *dicta* laid down in Gibbons v. Ogden, upheld the police power of the state.

In the License Cases,[11] consisting of the three cases of Thurlow v. Massachusetts, Fletcher v. Rhode Island, and Peirce v. New Hampshire, the constitutionality of the prohibition laws of the

[8] 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.
[9] 9 Wheat. 1, 6 L. ed. 23.
[10] 11 Pet. 102, 9 L. ed. 648.
[11] License Cases, 5 How. 504, 12 L. ed. 256.

states mentioned was upheld. The reasoning and *dicta* contained in the opinion of the various judges, especially as to the New Hampshire case, were antagonistic to each other in an extreme degree. Three of the judges, including the chief justice,[12] acknowledged that the law of New Hampshire was a regulation of interstate commerce, but held it to be valid, as it did not conflict with any United States statute, and then attempted the hopeless task of reconciling this opinion with the decision in Gibbons v. Ogden. Justice Grier stood forth as the extreme exponent of the doctrine of the states' rights, by holding that the police power of the state was paramount over the power of Congress to regulate interstate commerce. Another judge[13] held that the right to import did not include the right to sell. Justice Woodbury took a position very similar to that afterward laid down in the case of Cooley v. Wardens of the Port; in his decision he distinguished between those regulations of commerce which required uniformity of application throughout the country and that other class of regulations which were of only local application or importance, holding that the control of Congress over the former was exclusive, while, as regards the latter, state regulations might be permitted so long as they did not conflict with Federal legislation. Justice McLain was the only judge who in this case asserted in his opinion the doctrine of Gibbons v. Ogden.

This doctrine, however, was again upheld by a majority of the court in the Passenger Cases.[14] These cases involved the constitutionality of laws passed by the states of New York and Massachusetts imposing a tax upon all passengers arriving from other states or foreign countries, the proceeds of which taxes were to go, first, to pay the state's expenses of executing its police laws excluding paupers and convicts, and the surplus, if any, to be applied in the general expenses of the state. Justice Woodbury, in a dissenting opinion, reiterated the distinction drawn by him in the license cases. Three other judges also dissented from the opinion of the court.

The modern rule on this question received the sanction of the court for the first time in Cooley v. Port Wardens,[15] although it had been anticipated by Mr. Justice Woodbury in his opinions in the License Cases and the Passenger Cases. The statute whose constitutionality was involved in Cooley v. Port Wardens, was one of the state of Pennsylvania regulating the employment of pilots in the port of Philadelphia. In their decision in this case the judges of the Supreme Court distinguished between regulations of commerce in which uniformity throughout the United States is desirable and those other regulations which, being local in their nature, may properly admit of variations in different places to meet varying local conditions. As to the first class of regulations, the court affirmed the rule in Gibbons v. Ogden; as to the second class, it held that in the absence of Federal statutes the different states might legislate for their own territory. While the power of Congress was still held supreme in all cases, it was only exclusive in those of the first class.

The decision in Cooley v. Port Wardens, has for more than half a century been recognized as laying down the correct principle of law on this subject. The reason for the distinction made in this case, however, is not generally appreciated, and indeed is not stated in the decision. The underlying reason why local regulations affecting interstate commerce, passed by the states in the absence of any Federal statute on the exact point, should be held not to be in violation of the United States Constitution, is because such local regulations are proper, and often necessary, exercises of the police power. The Supreme Court of the United States, in rendering this decision, was (perhaps unconsciously) applying the rule above referred to, and permitting the states to regulate interstate commerce by the exercise of its police power, in cases where such exercise of the police power might properly be judged to be of importance to the state, and where the interference with the national power over interstate commerce

[12] Taney, Catron and Nelson.
[13] Judge Daniel.
[14] 7 How. 283, 12 L. ed. 702, The "Passenger Cases" included the cases of Smith v. Turner, and Norris v. Boston.
[15] 12 How. 299, 13 L. ed. 996, decided 1851.

was evidently unimportant, as was shown by the absence of any Federal statute on the subject.

The adoption of the 14th Amendment resulted in much litigation, involving the question of the effect of this amendment upon the relations previously existing between the Federal and the state governments. If the Supreme Court of the United States had adopted one widely espoused view of such effect, it would have entirely destroyed the previously existing nicely balanced decision of powers between the two governments, and would have rendered the states little more than geographical subdivisions of the national territory. Fortunately, the Supreme Court took that view of the question which produced the least disarrangement of existing conditions.

In particular it was held that the 14th Amendment did not impair the police power of the states.[16] On this point Chief Justice Fuller said: "And this court has uniformly recognized state legislation, legitimately for police purposes, as not, in the sense of the Constitution, necessarily infringing upon any right which has been confided, expressly or by implication, to the national government. The 14th Amendment, in forbidding a state to make or enforce any law abridging the privileges and immunities of citizens of the United States, or to deprive any person of life, liberty, or property without due process of law, or to deny any person within its jurisdiction the equal protection of the laws, did not invest, and did not attempt to invest, Congress with power to legislate upon subjects which are within the domain of state legislation." [17]

Merely asserting an act to be an act of police, however, does not make it so;[18] and many state laws which were enacted under the supposed authority of the police power have been held unconstitutional as a violation of the 14th Amendment.

Those laws passed under the alleged authority of the police power of the states, which have been the most productive of litigation, have been those laws which attempt to regulate the conduct of business. Many laws of this character have been upheld while many others have been declared unconstitutional. The most important test which can be applied here is the question whether the business sought to be regulated is of a quasi public character. If it is, reasonable regulations are proper; if it is not, regulation generally is not a proper exercise of the police power.

"Conceding the right to the states to enact police regulations where private property is devoted to public use, so far as to give an interest to the public in that use, yet where the business is purely private this wide police power does not exist. While guarding the public right and welfare we must not forget the person's right; we must not submerge the right of the individual in the ocean of public right. There must not be too much government intervention. Where such is the case, government is not free, but tyrannic." [19]

Munn v. Illinois [20] furnishes a good illustration of a valid law regulating business. This case involved the constitutionality of a state law regulating public elevators. The constitutionality of this statute was very properly sustained.

In the cases where state laws regulating business have been held unconstitutional, the decision has very frequently been based upon the theory that the law interfered with the freedom of contracting. The decisions of this character have been mainly decisions of state courts; and the motives of the judges in many of such cases have been very generally criticized, as the effect of such decisions has invariably been to deprive working men (or very often working women or children) of greatly needed protection in their occupations.

A very interesting phase of the problem of the police power of the states, which has recently begun to attract attention, is the question as to how far the

[16] Slaughter House Cases, 16 Wall. 36, 21 L. ed. 394.
[17] Re Rahrer, 140 U. S. 554, 35 L. ed. 574, 11 Sup. Ct. Rep. 865.
[18] Brannon's 14th Amendment, p. 201.
[19] Id. p. 200.
[20] 94 U. S. 113, 24 L. ed. 77.

states can be deprived of the right to exercise such power, through provisions contained in treaties made by the United States government with foreign countries.

The treaty-making power of the United States government was first considered by the Supreme Court of the United States in the case of Ware v. Hylton.[21] In this case there was involved the relative authority of a statute of the state of Virginia, confiscating debts due to citizens of said state by English citizens during the Revolutionary War, and the provisions of the treaty between the United States and England, protecting such debts.

The Supreme Court in their opinion held that (1) the state of Virginia had the power to pass the law confiscating debts; (2) the United States had the power to make the treaty referred to, including the said fourth article; (3) the treaty annulled the state statute; (4) British creditors could recover against their debtors who had paid their debts to the state of Virginia, and receive a discharge therefor; (5) the state of Virginia could not be compelled to reimburse such debtors, although justice required that such reimbursement should be made. The decision contains strong affirmations of the authority of treaties. Justice Chase in his opinion says: "A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a state legislature can stand in its way." And, again, "I have already proved that a treaty can totally annihilate any part of the Constitution of any of the individual states that is contrary to a treaty."

Following the authority of this leading case, the provision of treaties were held to prevail over those of state statutes in a number of cases including, Chirac v. Chirac,[22] Carneal v. Banks,[23] Hughes v. Edwards,[24] and Hauenstein v. Lynham.[25]

In all the cases previously cited, some treaty made by the United States was held to prevail over some state statute. On the other hand, the Supreme Court of the United States has never, in any decision, permitted a state statute to prevail against a Federal treaty. There can be little or no dispute as to the correctness of each decision of the Federal Supreme Court on the subject, so far as it applies to the facts of the particular case. The *dicta* in some of these cases, however, go too far and lay down misleading and erroneous legal statements. Some of these statements, such as that of Justice Chase in Ware v. Hylton,[26] to the effect that "a treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a state legislature can stand in its way;" and, again, that "I have already proved that a treaty can totally annihilate any part of the Constitution of any of the individual states that is contrary to a treaty,"—seem to bear out the proposition that any provision of any treaty will be absolutely binding upon a state, and can override any provision of a state Constitution or statute.

Such a position, however, is absolutely untenable, and is unsupportable by any direct authority. There are, and in the very nature of the character of the American government, must be, limitations upon the power of the Federal government to bind the states by the provisions of treaties with foreign nations.

There is always a tendency, with judges of any courts, when they indulge in the use of *dicta*, to strengthen the decision in the present case before them by the use of *dicta* far too broad and sweeping in its application. The result often is a correct decision in the case before the court, but the enunciation of legal principles in the form of *dicta* which will rise up to plague lawyers and judges in future cases, for years.

It is important that the true rule, one broad enough to be applicable in all cases, governing the extent of the authority of Federal treaties over state statutes, shall be established by the United States Supreme Court at as early a period as possible.

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[21] 3 Dall. 199, 1 L. ed. 568.
[22] 2 Wheat. 259, 4 L. ed. 234.
[23] 10 Wheat. 181, 6 L. ed. 297.
[24] 9 Wheat. 489, 6 L. ed. 142.
[25] 100 U. S. 483, 25 L. ed. 628.
[26] 3 Dall. 199, 1 L. ed. 568.

The true rule as to the binding effect of Federal statutes upon the states would seem to be, that the United States may bind the states by treaty, within the scope of the powers delegated by the states to the Federal government. A Federal treaty is the supreme law of the land, and binding upon the states in the same way, and to the same extent, as a Federal statute.

This doctrine was clearly set forth by the supreme court of California in the case of People ex rel. Atty. Gen. v. Naglee.[27] This was an information in the nature of a quo warranto, instituted by the attorney general against the defendant, who, the complaint alleged, had acted as collector of license fees to foreign miners. The object of the proceeding was to procure the opinion of the court on the constitutionality of the license law, which required foreigners to pay a fee of $20 a month for the privileges of gold mining, and prohibited all foreigners who had not a license from working in the mines. The complaint was demurred to, and judgment was given in favor of the defendant.

The applicant claims the law to be invalid on the ground that the act of the legislature is in conflict (1) with the Constitution of the United States; (2) with treaties of the United States with foreign nations; (3) with the treaty of Queretaro in particular; and (4) with the Bill of Rights and the Constitution of California. The court upheld the validity of the act against all these objections as a valid exercise of the police power.

This conflict between the provisions of the Federal treaties and the police power of the states is merely one aspect of the great problem of the proper relation between the Federal government and the governments of the several states under the Federal Constitution.

The decisions of the Federal courts upon the particular question discussed in this essay are very meager. Much of the law which has been laid down on these points by these courts is in the nature of poorly considered and very broad *dicta;* and many of the cases which, on their face, show a conflict between a state statute and a Federal treaty, were really more properly decided on other grounds. This particular question, therefore, can only be satisfactorily solved as a part of the general problem of the proper relation of the dual governments in this country.

The great principle whose truth cannot be successfully controverted, and which, if generally recognized and acknowledged, would do much to solve the principles here discussed, is that the treaties and statutes of the Federal government stand on the footing of absolute equality. An equality not only in the case of a conflict one with the other (which has been long held and recognized), but also an equality as to their binding effect upon the states.

Two great underlying principles would seem to be: First, that the United States may bind the States by treaty within the scope of the powers delegated by the states to the Federal government by the United States Constitution, and no further; and second, that the police power of the state may prevail against or modify a Federal treaty when and so far as this is necessary in order to prevent the destruction or crippling of the sovereignty of the state government, but that the police power of the state cannot be set up against the provision of a Federal treaty when the effect of so doing would be not the protection of the state, but the prevention of the hindering of the exercise of a governmental power by the United States properly within the scope of the "delegated powers" of the United States government.

Albert H. Putney

[27] 1 Cal. 232, 52 Am. Dec. 312.

Power of Municipality to Prevent Overcrowding of Street Cars

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OWING to the rapid increase in the population of the United States in general in recent years, and especially owing to the excessive increase in urban population, the problem of transportation which faces the modern American city is a serious one. Everywhere is seen a continual expansion of transportation facilities. The smaller cities which formerly got along very well with single-track street railways now find them inadequate and are double-tracking their streets and multiplying their car lines; the larger cities have already been compelled to resort to the air above, the earth beneath, and the waters under the earth in order to find room for their steadily increasing streams of traffic. Even as early as 1887, Judge Francis M. Finch recognized this inevitable condition when he declared that street railways may occupy every street in a city and iron the whole surface, or spin their webs in the air over every avenue, or undermine the entire system of city streets.[1]

The United States census of 1910 showed that on June 30, 1907, the number of passenger street cars in use in the whole country was 70,016, an increase for the preceding five years of 16 per cent, and that the number of passengers carried upon those cars during the fiscal year ending on that date was over 9,500,000,000, an increase in the same period of 63 per cent. When analyzed, these figures indicate the enormous part played by the street railway in our time. Indeed the much criticized street car might almost be called the star performer on the stage of our modern city life. The figures quoted show that the street cars of the nation in that one year performed a service equivalent to carrying every man, woman, and child in the country one hundred times; that the number of passengers carried on each car each day of the year averaged somewhat more than 370. It can easily be seen that, without some such method of public conveyance, the modern city would never have been possible, and that if public street transportation should now be abolished, the city would be absolutely demoralized. Witness the havoc wrought even in an hour with the "power off."

Naturally, then, the matter of street railways is one in which the public is chiefly and vitally interested, and their construction and operation are always charged with this public interest. The authority to make use of the public streets of a city for railroad purposes resides in the state and is a part of the sovereign power, and the right or privilege of constructing and operating railroads in the streets must always proceed from that source. City authorities derive all their power in respect to the granting of such rights from the legislature, and must exercise it in the manner and upon the conditions prescribed by the statute.[2]

Ordinarily the common council or other legislative body of a municipality is by statute clothed with power to regulate the streets by ordinance, and to impose reasonable regulations upon street railroads in their use of the streets. And a grant to a corporation of the right to transact business in the streets confers no immunity from any police control to

[1] Re New York Dist. R. Co. 107 N. Y. 42, 14 N. E. 187.

[2] Beekman v. Third Ave. R. Co. 153 N. Y. 144, 47 N. E. 277.

which a citizen could be subjected, and a reasonable regulation of the enjoyment of a franchise is not a denial of the right nor an invasion of the franchise.[3]

Although a street railway franchise may constitute a contract within the protection of the Constitution of the United States, yet such contract must be deemed to have been accepted by the railway company subject to the police power of the municipality to regulate the manner in which the company shall use the streets.[4]

Reasonable police regulations concerning the operation of cars in the public streets in the interest of public safety, comfort, and convenience are sanctioned on the ground of necessity. Corporations or individuals maintaining tracks and running cars in the public thoroughfares may be compelled to do whatever is within reason required to promote these objects.[5]

This power of the municipality to regulate the operation of street railways within its jurisdiction is a broad one, and ordinances intended for that purpose will not be declared unreasonable and void by the courts except for good cause shown. And when it appears on the face of the ordinance that its purpose is to safeguard the public welfare, or where the regulation can fairly be said to tend toward a better and safer condition, it will ordinarily be presumed to be valid, and the discretion of the council will not be interfered with upon light grounds.[6]

As applied to the control of street railways, the police power is the continuing and paramount authority of the legislature, within its constitutional prerogatives, and of municipal corporations, under their delegated powers, to establish regulations, which promote the public welfare, do not unreasonably interfere with the franchise, management, or business of the company, or violate the obligations of any valid contract.[7]

Among the many subjects of regulation recognized with respect to the operation of street cars are the number of servants,[8] screens for the same,[9] rate of fare,[10] tickets,[11] transfers,[12] separation of races, speed,[13] stopping before crossing streets,[14] stopping for passengers, frequency of car service, vigilant watch,[15] brakes, fenders,[16] warnings, use of sand on tracks, use of salt,[17] and sprinkling the tracks.[18]

Similarly, the power of a municipality to make reasonable regulations for the prevention of overcrowding in street cars has often been recognized and is generally admitted, since overcrowding tends to the discomfort and inconvenience of, and danger to, the public.

Thus it has been held proper for a city to make it unlawful for a street railway company to permit a greater number of passengers to ride in any car than one

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[3] 1 Nellis, Street Railroads, 2d ed. § 117.

[4] People ex rel. Geneva v. Geneva, W. S. F. & C. L. Traction Co. 112 App. Div. 581, 98 N. Y. Supp. 719.

[5] McQuillin, Mun. Corp. § 953.

[6] People v. Detroit United R. Co. 134 Mich. 682, 104 Am. St. Rep. 626, 97 N. W. 36, 63 L.R.A. 746.

[7] Booth, Street Railways, § 220.

[8] See note to South Covington & C. Street R. Co. v. Berry, 15 L.R.A. 604, as to the validity of ordinances requiring conductor on street car.

[9] See note to Silva v. Newport, 42 L.R.A. (N.S.) 1060, as to the validity of statutes and ordinances for the protection or comfort of street car operatives.

[10] See note to Sternberg v. State, 19 L.R.A. 570, as to regulation of street railways as to fares.

[11] See Rice v. Detroit, Y. & A. A. R. Co. 122 Mich. 677, 81 N. W. 927, 48 L.R.A. 84.

[12] See Chicago Union Traction Co. v. Chicago, 199 Ill. 484, 65 N. E. 451, 59 L.R.A. 631, and Ex parte Lorenzen, 128 Cal. 431, 79 Am. St. Rep. 47, 61 Pac. 68, 50 L.R.A. 55.

[13] See note to Ford v. Paducah City R. Co. 8 L.R.A.(N.S.) 1093, as to operating street car at speed in excess of that prescribed by ordinance as negligence, and see State, Cape May, D. B. & S. P. R. Co., Prosecutor, v. Cape May, 59 N. J. L. 393, 36 Atl. 679, 36 L.R.A. 656.

[14] See State, Trenton Horse R. Co., Prosecutor, v. Trenton, 53 N. J. L. 132, 20 Atl. 1076, 11 L.R.A. 410.

[15] See Fath v. Tower Grove & L. R. Co. 105 Mo. 537, 16 S. W. 913, 13 L.R.A. 74.

[16] See State, Cape May, D. B. & S. P. R. Co., Prosecutor, v. Cape May, supra.

[17] See State, Consolidated Traction Co., Prosecutor, v. Elizabeth, 58 N. J. L. 619, 34 Atl. 146, 32 L.R.A. 170.

[18] See note to St. Paul v. St. Paul City R. Co. 36 L.R.A.(N.S.) 235, as to power to compel street railway to sprinkle tracks.

and one third the number of seats provided in the same.[19]

And an ordinance requiring the street railway company to furnish a sufficient number of cars on each separate line to carry passengers comfortably and without overcrowding, and providing a penalty for its violation, is also within the police power of a city. Such an ordinance has for its object the laudable purpose of protecting the traveling public against discomfort, annoyance, and danger; and, being designed to promote the public safety and health, it will be sustained.[20]

An ordinance of the city of Minneapolis provided, first, that the street railway company should post in its cars the number of people to be reasonably carried in each car; second, that the company should continuously provide and operate upon every part of each car line within the city a sufficient number of cars to receive and carry all persons desiring transportation thereon, without admitting into any such car more passengers than the carrying capacity thereof (75 in that case); and third, that whenever any passengers should be admitted in excess of the carrying capacity, the company should forfeit a certain sum for each and every passenger so admitted. The ordinance was held valid as within the power of the city in the exercise of the functions committed to its care by the state. The court emphasizes the fact that no penalty was provided for failure to comply with the second requirement, and that in regard to the third stipulation, the company was not required to receive more than the carrying capacity, but might run a car from one end of the line to the other, if filled to its capacity, without stopping anywhere except to allow passengers to alight, and might thus avoid the penalty. It was stated as a general principle that cities may properly make such regulations of street car companies as are deemed necessary for public convenience, safety, or health, and that the question of expense to which the company is put in order to comply with such regulations is not important.[21]

And in a recent New Jersey case, where an ordinance required the street railway corporation during designated "rush" hours to run from certain congested terminals "a sufficient number of cars to provide with a seat every passenger from whom a fare is demanded," it was conceded by the railway corporation that the police power of the city fairly included such regulation of their business out of regard for the comfort, safety, and health of the passengers, and it was contended simply that the ordinance was unreasonable because of the impossibility of compliance therewith.

In delivering the opinion of the court, Judge Pitney remarks that although the situation was difficult, yet it was such as to render it proper that the traction company should be required to do all that reasonably lay within its power to furnish a sufficient number of cars to accommodate the passengers comfortably, and it was held that the ordinance was not so unreasonable as to be void, especially in view of the fact that no effort had yet been made by the traction company to comply with it.[22]

And under a statute granting local authorities the power of making and enforcing rules and regulations with respect to tramway carriages, a borough council may require every proprietor of a tram carriage to cause a statement of the number of passengers authorized to be carried at any one time in and upon such carriage to be painted conspicuously on the inside and outside of such carriage, and may further provide that no proprietor or conductor of any tram carriage shall suffer to be carried at any one time in or upon such carriage a greater number of passengers than will admit of the provision of seating accommodations to the extent at least of 16 inches from side to side and 15 inches from front to back of every seat for each person carried, and of accommodations

[19] South Covington & C. R. Co. v. Covington, 146 Ky. 592, 143 S. W. 28, — L.R.A. (N.S.) —.

[20] Chicago v. Chicago City R. Co. 222 Ill. 560, 78 N. E. 890.

[21] Minneapolis Street R. Co. v. Minneapolis, 189 Fed. 445.

[22] North Jersey Street R. Co. v. Jersey City, 75 N. J. L. 349, 67 Atl. 1072.

to enable every such person to sit with ease.[23]

However, where an ordinance of the city of St. Louis required the street railway company to report quarterly to the city register as to the number of trips made and passengers carried during the quarter, and also required the register, if any report showed that the company had carried an average of over eighteen persons per trip to each car since the last previous report, to inform a police justice of that fact, and the ordinance further provided that this situation should subject the company to a fine, it was urged that the second provision was unreasonable and illegal, and that the first was so connected with it that both must fall together. And the court, in holding the first provision valid and separable from the second, implies that the latter may be invalid, though there is no explicit statement to that effect.[24]

And in the Minneapolis case, supra, reference was made to a "case from the city of Detroit" which seems not to have been reported. It is said, however, that in that case an ordinance required the street railway company during certain hours of the day to provide a sufficient number of cars to accommodate passengers, so that no car should carry a greater number of passengers than its seating capacity and one half as many more; and further required any car when signaled, to stop for more passengers, although already filled to or in excess of the number specified, unless another car should be following within a distance of 200 feet, under penalty of a fine. As a result, the only way the company could comply, without being liable to the penalty, was by running cars every twenty seconds, and this was deemed to impose so tremendous a liability and obligation upon the company in the purchase of new equipment that the ordinance was held to be unreasonable and void.

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[23] Smith v. Butler, L. R. 16 Q. B. Div. 349, 34 Week. Rep. 416.

[24] St. Louis v. St. Louis R. Co. 89 Mo. 44, 58 Am. Rep. 82, 1 S. W. 305.

FIRST USE OF PHRASE "POLICE POWER."

In 1827, three cases of immense effect upon the future commercial development of the country were decided. In the first—Brown v. Maryland (12 Wheaton, 419) the court announced for the first time the "original package" doctrine and the phrase "police power" first appeared. Like most of the other cases of this period, it turned on the issue of States' Rights. It was argued by Attorney-General Wirt and W. M. Meredith against Roger B. Taney and Reverdy Johnson and was decided March 12.—Charles Warren's History of the American Bar.

Historical View of the Office of Sheriff in England

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THE office of sheriff is one of ancient origin, so old in fact that the exact time of its creation seems to be obscured by the mists of time and legend. The first date given by Blackstone, in his commentaries, in reference to the shrievalty is during the reign of Edward I., or about the year 1300, although he mentions the fact that the office existed long prior to that time. Other authorities are equally indefinite as to the time of the origin of the sheriff's office, although they agree that it is one of great antiquity, some mentioning its existence as early as the ninth century.

But whenever the date of origin may have been, the nature of the office of sheriff from the first is clear. Upon the division of the Kingdom of Great Britain into counties, the government of each county was, of course, primarily in the King; but the Monarch being unable or disinclined to personally supervise the affairs of the county, its government became lodged in an earl or count, who was appointed by the King and held office during his pleasure. But in the course of time, as the office of earl greatly increased in importance, and as the many duties incident to the government of the county and the diversity of detail, which had gradually grown about its administration, caused his duties to become too burdensome, it was seen that some other office would have to be created which would relieve the King's noblemen from their uncongenial labors without detracting from their position any of its dignity and honor.

The office of sheriff was then created to fill this need. The word "sheriff" is derived from the two words "shire reeve," meaning the governor of the county or shire. He was called in Latin *vice comes,* being the deputy of the earl or comes. Upon the creation of this office, all the business of the government of the county was transacted by the sheriff; and he became absolutely independent of the earl, although he was still called *vice comes.* He was obliged to execute the King's writs, and the territory over which he had jurisdiction was referred to as his bailiwick.

The oldest records show that when the duties of the earls became too onerous and the office of sheriff was created, he was chosen, not by the King, as was his forerunner in office, but by the freeholders of the county over which he was to have authority. During the reign of Edward I., the administrative reform which was then inaugurated, and which proved so revolutionary in its relation to the land laws existing at the time, included the office of sheriff. The King, who was always ready to strengthen his throne by currying favor with the people and seeing that their share in the government was not abridged, had passed a statute confirming the custom then in existence of the election of the sheriff, distinctly stating that this should be the mode of election in all counties where the office was not hereditary. This, of course, was but an incident in the long line of reforms at that time, which included the passage of the statute quia emptores and the statute of mortmain of 1279, and signalizes one of the early struggles of the English people in their long and constant warfare for liberty and justice.

There were some counties, however, where the office of sheriff was hereditary, and they, of course, were not affected by the statute of Edward I. The rule of descent in these cases would please even the most violent exponent of the rights of women, for Bacon tells us that the office descended regardless of sex, and that the shrievalty of Westmoreland was once exercised by Anne, Countess of Pembroke, in person, she even sitting on the bench with the judges. The office of sheriff in Scotland seems to have been hereditary up to the time of George II.

With the accession of Edward II. to the throne of England, there soon followed the series of conflicts between the throne and the barons, culminating in the victory of the latter and the institution of the baronial committee which for the time being succeeded in practically governing the realm. Here, again, we see the trend of government having its effect on the sheriff's office, and the decrease of the popular voice coincident with the rise of an oligarchy is well illustrated by the abolition of the popular election to the shrievalty and the nomination of the occupant of that office by chancellor, treasurer, and judges. These men were to meet on the 3d of November of each year in the exchequer chamber to choose three names in each county, to be presented to the King with their recommendation, and from this list the King was to name the various sheriffs to be assigned. Even this formality, Bacon says, was not necessary, as the King by his prerogative might have chosen the sheriff independently. Blackstone, in his commentaries, seems to feel differently, however; and there appears to have been a sharp divergence of opinion on this subject. But the light-hearted Edward was the last man to exercise this prerogative, and he, doubtless, was more than glad to act upon the recommendation of his judges.

The method of electing the English sheriffs was slightly changed many times after the Statute of Edward II., but the changes in the main simply enlarged the list of men who were to nominate for the office. During the reign of Henry VI., it was decreed that the judges should meet on the morrow of All Soul's Day for the purpose of preparing the list. This was later changed, and the present custom is for them to meet on the morrow of St. Martin. It seems that now the judges must meet a second time, the interval between the two meetings being given the candidates to make valid excuses for not serving. After the second meeting, the names finally agreed upon are presented to the King for his approval, which is indicated by a punch on the parchment opposite the name chosen. It was thus that the expression, "pricking the sheriff," arose. The sheriff, before assuming his office, was, of course, obliged to subscribe to an oath, which was a product of the ancient common law and enumerated quite fully his official duties. His agreement in the oath to treat rich and poor alike indicates that the accusation that the law is not strictly impartial on this point is not a modern cry, but is perhaps always to be expected from the more unfortunate class in the community.

It seems to have been an ancient custom for the sheriff to hold office for one year, and in the reign of Edward III., it was enacted that no sheriff should stay in office over a year, upon the penalty of paying £200 yearly, as long as he held office beyond his term. In fact, so jealous were they of the power of the sheriff's office, and so fearful lest it be unwarrantably exercised, that in the early part of the reign of Richard II., a law was enacted that no one should again be chosen sheriff for two years, after the expiration of his term. Although the statute of Edward III. was later confirmed, during the reign of Henry VI., some authorities hold that the King, by his prerogative, may grant the shrievalty for years or even for life.

As the office of sheriff at its creation became one of great importance, and increased rapidly in responsibility and power, it was necessary to specify that the holder should be a man of considerable means. It was impossible to get away entirely from the dignity and honor of the office; and while, of course, the sheriff was an inferior personage to his forerunner, the earl, still he immediately be-

came an official of much importance. In the reigns of Edward II. and III., statutes were passed requiring that no one should be sheriff that was not possessed of considerable land and could be answerable to the King in case complaint should be made against his office. The religious qualification was, of course, prescribed for this office as well as for all others; and its candidates frequently had to be the target of heated discussions and decisions as to whether or not dissenters should hold office. Once in office, however, the sheriff was compelled to devote all his time and energy to its administration, and it was universally held that he could hold no other office before the expiration of his term.

The sheriff being a strictly county officer, considerable discussion in time arose as to the extent and limit of his jurisdiction. Had he any power either judicial or ministerial outside the confines of his own bailiwick? And, if so, how could he execute it? The sheriff's functions may be divided roughly into two classes, of which more will be said later, *viz.*, those in which he was to act as a judge, and those in which his duties were of a purely ministerial character. The old decisions held that as to the first group of duties the jurisdiction of the sheriff did not extend beyond the boundaries of his own county, while among the latter group there were certain acts which, if they were committed in another county, were perfectly valid. He might return a writ out of his own county, for instance. Or, if he was compelled to conduct a prisoner to some place outside of his county, he could transport him through several other counties until he lodged him where he was ordered. Also if a prisoner should escape into a foreign county, the sheriff might enter the territory of that county for the purpose of capture and return.

The importance of having a resident sheriff in time came to be recognized; for in the reign of Henry IV., it was enacted that the sheriff must be a resident of the community over which he presided. Here was another act which secured to the people a reform in their county government. This act was later supplemented by one passed at the time of Henry VI., which prevented the sheriff from disposing of his bailiwick for a compensation, also stopping leases and sales of the office to undersheriffs or outside persons.

The duties of the sheriff have always been many and diverse, being both ministerial and judicial in character. When the office was first created, it seems clear that the judicial powers of the shrievalty were quite extensive, which, of course, made the office at once one of considerable dignity. The early sheriffs appear to have had jurisdiction over capital offenses, such as treasons and felonies, and could hear and determine the same, and as the local representative of the King they were second to none in importance and power.

But we soon see, however, the finger of fate pointed at the unhappy sheriff, and the long line of statutes and decisions which have gradually reduced this office from its one-time position of accepted pre-eminence to its present-day position of supposed inferiority, soon starts its ruthless pace. The immortal victory of the people on the plains of Runnymede, and the granting of the great charter of liberty by King John to the English, did not fail to have its effect on the power and prestige of the sheriff's office; for we find in one of the chapters of Magna Charta this provision, that no sheriff, constable, or other bailiff of the King shall hold pleas of the Crown. Here, indeed, was dealt a severe blow at a powerful office. Under the rule of the autocratic Edward IV., in the latter half of the fifteenth century, this office again lost much of its judicial power, as the sheriff was prevented from issuing processes in certain capital offenses. Thus, as we have seen, the sheriff had much of his former power taken from him. There still remained, however, considerable judicial authority which he could wield. Offenses of a public nature, he had much control over, and it was here as a preserver of the peace that his importance lay. Assaults and batteries if accompanied with bloodshed, and public riots and disorder, came under his judicial authority, as did more minor offenses, such as annoyances on highways and bridges and the keeping of false weights and measures, etc. He also could hear and deter-

mine in his own court actions where small amounts were involved. Thus, though with power and prestige injured, the sheriff was still a man of no mean importance.

While the judicial powers of the sheriff were greatly abridged, as we have seen, his ministerial powers continued to be many and large. It was he who had to execute all processes issuing from the King's courts, and while these were usually regular, still it was for him to scrutinize carefully the jurisdiction of the court, as he might be held liable if the writs issued proved not to be valid. When a criminal action was started, the sheriff had to arrest and keep in proper custody the prisoner, and, after he was sentenced, had to see that it was carried into effect. If the prisoner was sentenced to death, it was the sheriff whose duty it was to supervise the execution. In the bringing of civil actions, he seemed to play an indispensable part. He was to serve the writ and to see that the parties were before the court. When once the case was brought on for trial, he had to summon and gather the jury, and after the rendition of the verdict, it was his duty to see that it was properly executed. If for any reason the sheriff was thought to be incapable of impartially serving the writ, the ancient custom was to give it to the coroner or such officer connected with the administration of justice who could exercise the duty impartially. We thus see that practically the whole judicial procedure from the routine standpoint, both in criminal and civil cases, was lodged in the sheriff's hands, and the responsibility of seeing that justice was done was largely in him.

But from the beginning of all accounts of the sheriff's office, and his manifold powers and duties, his chief right to fame and position seemed to be as the keeper of the King's peace. Here he held undoubted and undisputed sway, and no one in the county dared defy his bidding. Blackstone says that in this respect he was the first man in the county and superior in rank to anyone, even his fellow resident nobles. It was for him, absolutely and independently, to see that conditions in the territory under his jurisdiction were free from disorder of all kinds, and that the inhabitants were able to attend their every-day affairs without the molestation of robbers or marauders. If anyone was so bold as to attempt a breach of the peace, let him beware, for the sheriff and his deputies had the power to imprison him immediately, and if necessary pursue him into the confines of other counties for the purpose of his capture. All traitors, murderers, and other criminals were at the mercy of the sheriff, and when caught were to be committed at once to jail to await their trial. So large were the sheriff's powers in regard to the keeping of the peace, and so important was it that he be empowered to execute them, that, if the occasion arose when he was unable to act alone or with his authorized deputies, he could command every man of his county over the age of fifteen and under the degree of a peer to attend him and help him maintain order. This body of men was called the "posse comitatus" or power of the county, and was sometimes called to defend the county against the King's enemies, to quell riots, and also to pursue criminals when the occasion so warranted. By a statute passed in the reign of Henry V., it was provided that anyone failing to answer the proper call of the sheriff in times of need should be punished by both fine and imprisonment. In the execution of a civil process, the sheriff was not allowed to summon his posse unless great resistance to his will was made, and any needless violence used was a punishable offense.

It doubtless was because of the sheriff's great strength as a peace officer that certain judicial powers were taken from him by Magna Charta; for, as Blackstone says, it would have been highly unbecoming for an executioner of justice to be the judge of justice.

There is one other ancient duty of the sheriff that should be touched upon. If there was any property in which the King had any right at all, that right was to be looked after and protected by the sheriff; also any lands that devolved to the Crown by attainder or escheat were to be seized by him to the use of the King. He also was frequently compelled to collect any rents accruing to the King, within his jurisdiction.

In the performance of his ministerial duties, the sheriff was supposed to act always in the most expeditious manner possible, and was allowed to show no favors in giving time to those against whom he was compelled to act. This rule, of course, grew out of the many temptations that were placed in his way for the purpose of securing delay. He was equally restrained, however, from treating with violence and cruelty those who came under his charge, and he could exert no greater force in the accomplishment of his ends than was required. While it was the duty of the sheriff to arrest upon the receipt of a warrant, it is clear that he had no right to take action before the warrant was received by him; an arrest being made without a warrant, although the writ was later issued, was declared to be wrongful.

As we have seen the sheriff had almost unlimited powers in raising the posse comitatus and pursuing and capturing fugitive criminals. His power of forcible entry, however, was somewhat abridged, as the English law has always had great respect for the safety and peace of citizens. Every man's house was looked upon as his castle, and once inside its walls the owner was safe from molestation, unless he was guilty of great offense. Hence in ordinary cases, the sheriff in executing a writ was not permitted to break open the door of a residence, to serve the owner lodged inside, and if he did so he would be guilty of trespass. There seems to have been a somewhat subtle distinction drawn between inner and outer doors, and many of the old cases held that the peace officer was justified in breaking down inner doors if he found the outer door open.

While the general rule of entry remained settled, exception was made in all cases where the King was a party to the action, and also where a member of Parliament was to be committed to the Tower for a breach of privilege. Here the sheriff's power was unlimited, and if the door was not opened at his command he was free to break it down and enter to perform his duty either by taking the owner personally or by executing on his property found within.

If the person desired within the house was not the owner, he was not entitled to this privilege of freedom from the sheriff's process, and both he and his goods, if fraudulently conveyed there, could be reached by the sheriff even if it was necessary for him to break open the doors to enter. In all cases it seems that when once the peace officers gained a rightful entry to the house, they might enter all rooms of the house, even though it might be necessary to break the inner door. They also might enter forcibly, barns and out houses, not physically connected with the house.

Executions that were placed in the hands of the sheriff were grouped under two heads, *viz.*, against the property and against the person. Executions against the property were of several kinds. The one most commonly used was known as a fieri facias. By this writ only the personal goods and chattles of the debtor could be taken in execution. By a levari facias the sheriff may not only sell the goods that could be taken under a fieri facias, but he could collect the debt out of the profits of the land, though of course the land itself could not be touched under either of these writs. In these cases, the sheriff had to be most careful to inquire as to the title of the goods about to be taken, for goods that he seized were taken at his peril. Upon the issuance of an elegit it was the duty of the sheriff to impanel a jury which was to appraise the goods of the debtor, either real or personal. Upon their verdict, the sheriff was to deliver the goods in satisfaction of the execution. This, however, must be satisfied first from the personal property; and of course, if that proved sufficient the debtor's lands were not touched. Upon a writ of habere facias possessionem the seisin or possession was performed personally by the sheriff.

One of the saddest pages of English history is that which tells of the method of imprisonment for debt, which was so common at one time, and of the thousands of poor victims who were compelled to end their days in the noisome prisons of the land, because of their inability to satisfy their obligations. Pamphlet after pamphlet was issued against this vicious and cruel system, but not until the public conscience was thor-

oughly aroused, and its wickedness fully exposed, was the evil mitigated. One of the leading actors in this tragedy was, of course, the sheriff, who was compelled upon the issuance of the writ capias ad satisfaciendum to seize the body of the debtor and imprison him until such time as he was able to discharge his debt.

A statute passed in the reign of Edward I. compelled the sheriff to keep the debtor in jail at the debtor's own expense until he shall have satisfied all arrears. On the receipt of this writ the sheriff was not allowed to take bail, and, if necessary, could call out the posse comitatus to capture and retain the debtor.

Before the passage of a statute in the reign of Henry VI., as we have seen, the sheriff was not obliged to admit to bail the prisoner. At this time, however, the injustices to debtors becoming so flagrant, a law was enacted stating that on the presentment of sufficient bail the sheriff must free his prisoner.

The sheriff was held strictly accountable for the proper performance of his duties, and was frequently sued because of his failure, negligent or otherwise, to properly execute them. In all cases, however, he was permitted to conduct his defense, and, if necessary, could retain his personal attorney.

But the line of succession, as far as the performance of county duties was concerned, did not stop with the sheriff himself. After receiving his legacy, of tasks from the earl, it was apparent that no one man could perform in person all the functions of the office, and the sheriff was thus authorized to secure the aid of undersheriffs and officers. While this appeared to be a necessity, still it opened the way to many fraudulent practices and deceptions on the part of the subordinates in office, besides giving the high sheriff valued opportunities for shirking his duties. In fact, according to Blackstone, most of the duties of the office were performed by the undersheriff. This man was supposed to stay in office only one year, and originally was not allowed to act as an attorney or to perform duties outside of his office.

The sheriff was also allowed to employ bailiffs, who were supposed to collect fines, execute writs, etc., in the county confines. These men were usually employed for their cunning, and soon became a despised class in the community.

Jailers were also allowed to the sheriff for the purpose of keeping his prisoners, and the high sheriff was held strictly answerable if they allowed any to escape. The abuses on the part of these jailers, once very great, were restrained by statutes passed in the reigns of George II. and George III., and better provisions were made for the maintenance and keeping of the prisoners.

To-day, the duties of the sheriff in England are numerous and varied, but little remains of the ancient splendor and magnificence that once surrounded him. He is chosen annually, and is often a magistrate of the county, and anyone is eligible provided he be possessed of sufficient means. Certain persons, such as peers and the clergy, etc., are exempt from duty. His duties are both judicial and administrative. The former being to assess damages under certain land acts, and in certain other cases where the defendant has made default in appearance, and nothing remains but the assessment of damages. His ministerial duties, of course, are numerous, such as attendance upon judges, the execution of writs, the detention of prisoners, and executing the sentence of death. He is obliged to maintain a certain amount of ceremony, and is held accountable for the upholding of the dignity of his office.

Such, in brief, is the story of the decline of the English shrievalty,—an office once second to none in the county in importance, in power, in prestige, and in splendor; it has been reduced, step by step, been shorn of its strength and glory, and is now at last little more than an automatic performer of routine affairs, retaining as if in feeble imitation of ages past, the shell of stately ceremony. As Maitland says, "The whole history of English justice and police might be brought under this rubric, the decline and fall of the sheriff."

Benj. R. Day

Tyranny by Majorities

BY JOHN W. McCRACKEN

Of the Pennsylvania Bar

THE great struggles for liberty recorded in history have been largely contests to determine the question as to where sovereignty should be lodged. When Louis XIV. proudly exclaimed, *L'état, c'est moi!* he was simply asserting that absolute sovereignty resides in the Monarch, or "the Divine Right of Kings." On the other hand, the expression, "We the people . . . do ordain," etc., in the preamble to our Federal Constitution, assumes that absolute sovereignty resides inherently in the people.

After "our fathers brought forth upon this continent a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal," the sovereignty was, in theory at least, lodged in a majority of voters. It is the theory of representative government that each statute is enacted by a majority of the voters. As a matter of fact, this is not always true, and in some states the referendum has been adopted to force a reconciliation between theory and practice. The referendum is simply a plan devised to make certain that the real sovereign has actually enacted the statute. But, for the purposes of this discussion we may assume that every law has the direct sanction of a majority of the voters; for the question as to where the sovereignty is lodged, is wholly distinct from the question, What rights has the individual as against the sovereign? In the United States, we are attempting to answer this latter question also, and it should never be confused with the former question.

Tyranny is no less odious when the tyrant is a majority of voters, than it is when one man is sovereign. If a man is unjustly deprived of his life, liberty, or property, he can find no consolation in the fact that a majority so decreed. It may be conceded that a majority is less likely to oppress than one man is, but that in no way relieves the one who is oppressed. Socrates, unjustly condemned by the Athenian Assembly, suffered even more than John Bunyan when persecuted by a Monarch, and Lord Baltimore with his followers suffered persecutions by a majority in the very refuge he had founded.

The American Plan.

Whether or not the founders of our government fully perceived the inevitable result of their work, they constructed the framework of a government peculiarly fitted to grapple with this question. They not only proclaimed to the world that a majority of the voters are sovereign, but they caused that sovereign to proclaim to all his citizens, present and future, that he would never exercise his sovereign power as against an individual by the establishment of a religion or by preventing a free exercise thereof, by abridging the freedom of speech and press, by denying his right of assembly or his right to keep and bear arms, by allowing unreasonable searches and seizures, by passing *ex post facto* laws or impairing the obligation of contracts, by taking his property for public use without compensation, and, generally speaking, by interfering in any way with his inalienable rights. Of course the sovereign reserved to himself the right to change the wording of his proclamation whenever fully convinced that the welfare of the whole people demand the change. Our state Constitutions differ in detail and wording, and the restrictions named above are only such as are quite commonly found in them.

Not only has the sovereign thus placed a limit upon his own power as against

the individual, but he has established courts of justice with power to compel him to keep his word. The spectacle of a court setting aside, as unconstitutional and void, a statute regularly enacted by the sovereign, has been for years a puzzle to foreign students of our system of government.

Principles of Construction.

It soon became evident that if these specific limitations are the only protection against tyranny, then in many respects there would be no protection at all. Scarcely a state Constitution contains a specific limitation that, strictly construed, would be a safeguard against laws restraining freedom of migration and settlement, freedom of occupation, freedom to acquire and dispose of property, or against oppressive legislation on many other subjects. To remedy this seeming defect, the courts have called to the aid of the individual, the general limitations, the most common of which are the equal protection of the laws which the Federal Constitution enjoins upon the states, and the due process of law clause of the same instrument. In this way the individual has been and is being fully protected against the tyranny of the majority.

On the other hand, it was soon found that if these limitations absolutely prohibit legislation within their field without exception, then we would have a government unable to protect the masses from many inconveniences, deprivations, dangers to health, etc., because of the power of individuals to successfully resist the sovereign power. To meet this danger the courts have almost uniformly held that the sovereign never intended by these safeguards to devest himself of the police power, *i. e.*, the power to compel the individual to yield to reasonable demands that the public is necessarily compelled to make. With the courts taking this liberal view in the interpretation of the Constitutions, the American innovation has succeeded far beyond even the most sanguine expectation of the early advocates of constitutional government.

Power to Amend.

However, there is yet another way of adapting the plan to meet the new conditions that necessarily arise with development. As above suggested, Constitutions may be amended. If the Constitution be regarded, in this respect, as a contract between the individual and the sovereign power, it would seem, at first glance, that the sovereign has in this a decided advantage. But when we consider the fact that each voter must so vote that his rights as a part of the public must not be strengthened at the expense of his rights as an individual, we at once conclude that there is not much danger from this source. If an individual should vote to deprive another of his rights, he is assisting to establish a general rule which in the near future may be the cause of his own persecution.

This power of amendment has not been abused, and in some cases, it has been used effectively to enforce public opinion against court decisions thought to be out of harmony with the spirit of progress.

For instance, it was held in Rodgers v. Coler, 166 N. Y. 1, 82 Am. St. Rep. 605, 59 N. E. 716, 52 L.R.A. 814, that a statute depriving a city, and one contracting with it to perform work on a public improvement, of the power to contract for the necessary labor at the best rates obtainable, violates the principles of civil liberty and the constitutional provisions protecting private property. This decision did not suit the people of the state of New York, so they amended the Constitution, expressly empowering the legislature to prescribe the hours of labor on public works (see Amendment of 1905), and caused their legislature to re-enact the statute. Later it was held in People ex rel. Engineering & Contracting Co. v. Metz, 193 N. Y. 148, 85 N. E. 1070, 24 L.R.A.(N.S.) 201, that the statute is now valid, so that the hours of labor for public work are now limited by law, and either the city or its contractor must pay the same for labor as is customary in similar grades of work notwithstanding the shorter hour limitation. Again, in Re Morgan, 26 Colo. 415, 77 Am. St. Rep. 269, 58 Pac. 1071, 47 L.R.A. 52, because of the peculiar word-

ing of the Constitution of Colorado, it was held that a statute limiting the hours of working men in all underground mines and in smelters, etc., to eight hours daily, was unconstitutional. A constitutional amendment known as art. 5, § 25a, was later, in 1902, adopted by the people of the state of Colorado as follows: "The general assembly shall provide by law, and shall prescribe suitable penalties for the violation thereof, for a period of employment not to exceed eight (8) hours within any twenty-four (24) hours (except in cases of emergency where life or property is in imminent danger), for persons employed in underground mines or other underground workings, blast furnaces, smelters, and any ore-reduction works or other branch of industry or labor that the general assembly may consider injurious or dangerous to health, life, or limb."

These two instances are here selected for the reason that they involve decisions upon the one subject that has come prominently to the attention of the people, and upon which there has been considerable diversity of opinion among the courts, largely because of different constitutional provisions. Those who wish to study the questions involved in these two examples will find helpful notes, on constitutionality of legislative limitation of hours of labor on public works, in 8 L.R.A.(N.S.) 131; 24 L.R.A.(N.S.) 201, and 34 L.R.A.(N.S.) 767, and on legislative limitation of hours of labor generally, in 65 L.R.A. 33; 12 L.R.A.(N.S.) 1130, and 26 L.R.A.(N.S.) 242.

Conclusion.

From what has been said above, it clearly appears that by a purely American innovation the rights of the public are fully protected by the police power at the same time that the rights of the individual are secure by virtue of both special and general restrictions upon the sovereign power; and that when experience demonstrates either that the power has been too much restricted or not sufficiently restricted, an amendment can readily be adopted to meet the needs or desires of the people; and that the splendid success of the experiment is due, in large measure, to the principle of refusing to allow the power that enacts a statute to be the interpreter thereof and the sole judge as to the extent of its own power.

Having introduced this innovation into the science of government, and noted its signal success, the American people will not likely abandon it and go back to the antiquated system of permitting an interpretation of a law by the same body that enacted it, even though that body be a majority of voters; or of permitting the lawmakers to enforce their interpretation upon the courts by the power of removal. It would seem that they are too progressive to step back into the condition which prevailed before the rise of the great American Republic. They will tolerate no tyranny by a King or by a majority.

John A McCracken

The Negro Law of Mississippi

BY S. F. DAVIS

Of the Mississippi Bar

THERE has been much written about the common law, the civil law, the statutory law, and the so-called "unwritten law," but we have another important branch of the law in the state of Mississippi, about which I do not remember of having ever seen any thing written, nor do I know of any school in which this branch of the law is taught. It must be learned by experience and observation, and it is more complicated than any other branch of the law of this land. I refer to the "negro law." Any young attorney from a foreign state might examine our Constitution and statutes and find that this was a common-law state, and that, except where it was modified by some statute, the common law was in full force and effect, and would further find that, if he was a citizen of the United States, above the age of twenty-one years of age, of a good moral character, and could pass a satisfactory examination on the common law and the statutory laws of the state, he would be granted license to practise law in all of her courts, upon his taking the oath prescribed by the statutes. He might also believe himself qualified to do so, but that is where he would make a very great mistake. The law which he has spent time and money to learn, and about which he has been interrogated on his examination for his admittance to the bar, is for the white people of this state; and the law he is going to be called on to practise more than any other, especially in the early years of his practice, is "negro law," about which (unless he is native born) he knows absolutely nothing, and about which no book on earth, so far as I know, sheds the faintest ray of light.

The "negro law" of Mississippi is a law of many parts, and is composed partly of the common law, statutory law, and the unwritten law, and to be able to tell just which one of these several branches of the law applies in any given case is an art rarely possessed, except by a native born attorney. From the letter of our statutes, a stranger might justifiably infer that they applied to all persons within this state, without regard to race, color, or previous condition of servitude, but nothing is farther from the truth. The judges, lawyers, and jurors all know that some of our laws are intended to be enforced against everybody, while others are to be enforced against the white people, and others are to be enforced only against the negroes; and they are enforced accordingly.

Descent and Distribution; Bigamy.

Under our system of administering the law, a negro has the same right to acquire, enjoy, and dispose of property, both real and personal, as a white man has, and when he dies intestate, leaving any property, it is distributed according to our statute of descent and distribution, but beyond that the rule varies and shifts from one to the other; sometimes in favor of the white man and sometimes in favor of the negro. There are some things declared by the statutes of this state to be a crime that a negro may do with impunity and never be molested, while a white man, for the same act, would get ten years in the state penitentiary. For instance, a negro may have one or more wives at one and the same time, with or without being married to any of them and no one cares; and it is not uncommon for the presiding judge to instruct the grand jury not to take any notice of it, if it should be called to their attention by any witness that might be called before them on other business. On

the other hand, if any white person should be guilty of the same offense, he would be indicted and, if convicted, he could safely count on ten years in the penitentiary.

Gambling.

Under our criminal statute it is a misdemeanor for any person to wager any money or other valuable thing on any game of chance, or to play for money at any game of cards or dice, etc.; but it is the unwritten law—and the unwritten law applies in this case—that all negroes may play a game of chance with dice, commonly called "craps" for money or any other valuable thing on Saturday nights or any time during the first day of the week commonly called Sunday, provided, however, it is conducted in a quiet, orderly manner in a vacant cabin or cotton house on the back side of the plantation. But it is also the unwritten law of this state, that a white person must not, at any time or place for either love or money or any other valuable thing, play a game of "craps," that being recognized as a negro game exclusively. It is also the unwritten law of this state, that all white persons may play a game of chance with cards, commonly called "poker," for money or any other valuable thing, provided, however, that said game is conducted in a quiet, orderly manner in some private place after business hours, but a negro must not, under any circumstances, play a game of "poker," for love or money, that being recognized as a white man's game.

Larceny.

If a white man be guilty of petit larceny in this state, he is either lynched or sent to the county convict farm for a long term. If a negro be guilty of petit larceny, he is either cursed, whipped, or made to pay the value of the thing stolen, or is sent to jail, all depending on what he has stolen and from whom he has stolen it. If he steals from another negro, he is arrested, tried before a justice of the peace, and sent to the county convict farm to work out his fine and cost. If he steals from a white man, he is not usually arrested or tried at all, but is generally whipped and made to return the articles stolen or pay their value, according always to circumstances. If he steals tobacco, whisky, chickens, or watermelons from any white man for whom he is working or for whom he has ever worked, nothing is ever done with him at all, it being well known to all white people that he cannot help doing those things, and is therefore not responsible for his acts in the premises, and any white man who would undertake to prosecute him on a charge of that kind would have no more show before a jury than a paper shirt in a bear fight.

Weapons.

If a negro be guilty of selling whisky, cocaine, or carrying a pistol, he is severely dealt with, that being necessary to protect the lives of both white and black, for there never was a more dangerous combination than a negro, whisky or cocaine, and a pistol. On the other hand, all able-bodied males above the age of sixteen years who live in the black belt, where the negroes outnumber the whites ten to one, are supposed to have pistols of standard make and size, and are supposed to carry them at all times, either concealed or otherwise, and are supposed to know how to use them to the best advantage on the shortest possible notice, notwithstanding the statute says that if any person who carries concealed, in whole or part, any bowie knife, dirk knife, butcher knife, pistol, etc., shall, on conviction, be fined not less than $25, etc., but this law applies only to the negro and the whites who live in the white belt, and has no application to the whites who live in the black belt.

Homicide.

The statutes of Mississippi also say that if any person shall be convicted of murder, he shall suffer death, unless the jury rendering the verdict shall fix the punishment at imprisonment in the penitentiary for the life of the convict. This law applies only where one white man kills another about something besides a woman. If the killing was about a wom-

an, he is tried by the unwritten law and usually acquitted. But this statute does not apply to a negro at all. If he kills a white man, and is caught, he is hanged, the time and place of his execution depending altogether on who caught him, the sheriff's posse or the friends of the deceased. If the sheriff's posse were the first to get possession of him, he is hanged the third Friday after court adjourns, if the friends of the deceased are the first to get possession of him, he is hanged at once, at or near the place where the killing occurred. When a negro is indicted for killing another negro, he is seldom, if ever, tried. The usual practice is for the court to appoint some young and inexperienced attorney to defend him; then, partly out of sympathy for the negro, and partly for the young attorney, the state's attorney allows him to plead not guilty to the murder charge, but guilty of manslaughter, and take sentence to the penitentiary, where he stays until he is pardoned a few years later. This plan always works very satisfactory to all parties concerned, —the state saves the expense of a trial, the negro is saved from being hanged, and the state gets another cotton producer on the state farm.

These are just a few of the general unwritten rules of practice in this state, the whole of which would fill a large volume, and are seldom, if ever, understood by anyone except the native born attorney of this state.

L. F. Lewis.

SWAN SONG.

When a lawyer's gray and faded,
Weary of his work and jaded,
Looking o'er the happy past,—
Time against him running fast,
Often times he'll tell to thee
What he was or used to be.

Blame him not, for memory traces
All the olden times and places,
Where his student life begun
Where his cases first were won,
Up along the pleasant way
Where his best successes lay.

Life to him seems like a drama
And its fading panorama
Flits before his dreaming eyes,
As its passing scenes arise,
Unto him 'tis ever new
Though it hath no charm for you.

Marvel not, for youth is fleeting
Soon life's evening you'll be greeting
And perhaps your lot may be
To indulge in reverie,
And like older men you know
Mourn the happy long ago.

Wm D Fatten

Divorce by Consent

BY HON. T. F. McCUE

Of the North Dakota Bar, and Ex-Attorney General

[ED. NOTE.—Uniform divorce laws and the ethics of divorce are subjects of widespread and growing interest This article is a novel contribution to the discussion. We shall be glad to hear from our readers on these subjects and to present their views in a series of papers culminating in the June 1914 number which will be devoted to the topic of marriage and divorce.]

SO that there may be no misunderstanding as to what is meant by divorce by consent, a few words in explanation of my position at the outstart may not be out of place, which may be summarized as follows: First, the parties would have to invoke the jurisdiction of a court clothed with the power of granting divorces. Second, mutually stipulate to the fact of marriage and if there be any issue, the names and ages of such issue, asking that a decree be entered; this without allegation or proof of any ground except the voluntary mutual consent of the parties. Third, the only fact the trial court could inquire into, as to the right of the relief asked, would be to ascertain whether the stipulation was entered into voluntarily and without coercion.

Whenever one attempts to advocate a principle or theme which is out of harmony with established rules, he exposes himself to the attacks of organized society. Knowing that divorce by consent is such, I realize that the penalty that is liable to be imposed is to be classed as spectacular, or a seeker of perverted notoriety; the severity of the criticism depends upon the state of society, or rather, the age in which the matter is being considered.

Lawyers, being a conservative body, and by reason of their experience in the profession, willingly accord a fair hearing, whether the proposition advanced be ordinary or extraordinary; therefore, if, in this article, I succeed in presenting a thought worthy of the honest consideration of the bar, it will more than counterbalance the censure of the laity.

I assume, in discussing this proposition, that the granting of a divorce is right. This assumption is based on the fact that our laws, as well as those of nearly every civilized country, recognize the right of divorce from the bonds of matrimony, upon proof of fixed or established grounds; therefore, I seek no controversy over the moral phase of the question, but desire to deal with the conditions that, as a matter of fact, exist.

Divorce laws and regulations for dissolving marital relations are among the most vexed, cumbersome, and complicated branches of the law encountered by the practitioner in the United States. Every state enacts its own divorce laws and divorce procedure, which varies according to the ideas of the lawmakers of the individual state. The result is that a marriage between divorced people may be legally entered into in one state, which is forbidden by the statute of an adjoining state. If such people cross the line and cohabit in the latter state, as husband and wife, they may be guilty of committing a felony. It needs no argument to convince anyone that such a system of law is wrong, and there is no excuse for its existence in this age of progress and advancement. The wrong is aggravated because every citizen of the United States is entitled to equal protection under the Federal Constitution.

Divorce by consent would be an advance step toward minimizing the conflict in the laws of the several states on the subject of divorce. First, it would set at rest the question as to the jurisdiction of the parties to the action, by the court granting the decree; because, in order for such a decree to be granted,

both of the parties would have to invoke the jurisdiction of the court. Second, all property rights could be finally adjudicated, while the care, custody, and control of minor children could be determined and regulated in the same manner as regulated by the existing laws, only more effectively, on account of the court having jurisdiction of both of the parties and the subject-matter.

In order for one to have faith in himself, he must first be honest with self, and before he condemns a principle, he should weigh it intelligently in the scale of known conditions, and not measure it alone by some fixed rule or form. Knowing the futility of controlling or regulating every human endeavor, action, or emotion by law, the uncompromising aim of every lawmaking power should be to formulate such laws as will best preserve the rights of society and relieve it from known abuses, and at the same time give equal protection to the individual.

When we weigh the operation and effect of the present divorce law in the scale of known conditions, we know, notwithstanding that many of the states have laws forbidding the granting of a divorce by consent or agreement, a large majority of the divorces granted in which there is no appearance by the respondent are begun, prosecuted, and granted with the tacit consent of the defaulting spouse. Lawyers know it, while judges cannot help but know it. These divorces are granted daily by courts who would refuse a divorce if collusion were shown; but as the prayer of the complainant is not resisted, the matter is rarely inquired into, and if the statutory ground is proven, the divorce is granted as a matter of course. This may be justly branded as a traffic in hypocrisy.

If the defendant is a nonresident, service is had, or the process of the court is put in motion by publication or some other substituted service, which gives the court no jurisdiction over the person of the defendant, and he cannot be made personally amenable to the provisions of the decree, and yet, he tacitly consented to every stage of the proceeding. Would it not be better to permit him to be a party to a proceeding of a divorce by consent and bind him by the decree, than to grant a divorce which is tacitly obtained by consent, and leave his personal rights unadjudicated and open to further litigation?

Many people who are cultured and refined, and whose integrity is unquestioned in the community where they resided, have left their homes and gone to foreign states, acquired a residence, invoked the jurisdiction of the courts of their adopted state, for the purpose of being relieved of their marriage vows. Moralists have decried this practice and the laws that permit it, but they seem to be unable to stem the tide, and the demoralizing practice continues. It seems to me that the thing for the moralist to do is to seek a remedy by supporting a sane law that will be honest in its scope, and not an inducement for violation. It is also apparent that our laws are at fault, and the only solution is for the state to either abolish the granting of divorce entirely, or else enact sane laws permitting the granting of the same. If a divorce by consent could have been obtained, the complainant would never have sought a residence in the foreign state, which she did to avoid the humiliation of making public her grounds for divorce, at home among her friends and acquaintances.

Why compel a party to prove a crime or an offense against her spouse in order to entitle her to a divorce, when her prayer is not resisted? What are the underlying principles that demand such a provision of our law? How did such procedure become incorporated in our laws?

In answer to the first question: proof in open court that the defendant is guilty of adultery cannot lend any sanctity to the marriage vow, nor will it tend to elevate society or improve the social standing of the plaintiff. On the contrary, the proof in open court of such fact must necessarily have a demoralizing effect upon society and a like effect upon the parties involved. The individual constitutes an integral part of society, and when an integral part of an organization is affected, the whole body is weakened in a corresponding ratio as the individual is to the aggregation; besides, it can only

furnish a judicial record which disgraces by its existence the innocent children of the parties.

If the proof of the statutory ground does not tend to improve the condition of our social fabric, punish or pardon the offense, or compensate the injured, there is no just or logical reason for the requirement.

An underlying principle, in order to justify the conclusion deduced therefrom, must be fundamentally true, and not a creation of sentiment or theory. It is confessedly true that the divorcing or dissolving of the marriage vows demoralizes sbciety, but the injury is occasioned by the result,—the divorce,—and not the means employed to obtain it. Whether it was granted by mutual consent or after the recital of the facts of a statutory ground, the effect of the divorce on society is the same. So that the philosophy of the law of divorce must be that to prohibit divorces would inflict greater injury than the granting of the same.

Therefore, we are forced to seek some other cause for the existence of the principle. Perhaps it finds justification in the claim that by making divorce procedure harsh and difficult, the number of divorces are thereby decreased. If this be true, it may be a justification; but in order to test its truth or falsity, we can only compare it with known conditions and apply it to the actual workings of our divorce courts. To go into statistics would extend this article beyond its intended space; besides, that would prove nothing, for the reason that we have no definite means of knowing what percentage of the divorces granted was the result of mutual consent.

To advocate the enactment of harsh procedure to prevent divorces is unsound, both from a legal and an equitable standpoint, because it is an admission that the state enacts a law and at the same time prescribes a procedure that is so severe as to deter the timid from invoking the remedy. If society is benefited through this scheme of the law, such benefit must necessarily be derived at the expense of the conscious or fearful; and confessedly, it is a remedy for the courageous, fearless, and brazen. Admitting all that is claimed for the scheme, it is tainted with duplicity; and though fair on its face, the net result of its workings proves it to be class legislation; confessedly such is the intent and purpose of the law.

The whole foundation upon which such a claim is based is purely and simply a theory, and not sustained by actual workings and results of the divorce court, which show that whenever a couple agree to have a divorce, a decree follows. One of the parties undertakes the trying ordeal and adapts herself to the harsh procedure.

Our divorce laws are the outgrowth of the conflict between the Roman law and the Canon law, the former recognizing the right of a full divorce and restoration to conjugal rights, while the latter denied it. Our laws upon the subject are the result of a compromise between these two contentions. The result of the compromise terminated into fixed forms or grounds for divorce, which the anti-divorce forces looked upon as a fetter or brake upon the granting of divorces, and which were regarded by the advocates of divorce as better than none at all.

These compromised and antiquated ideas have been enacted in one form or another as grounds for divorce by the several states, as well as the procedure to give them effect.

It would seem that as soon as the state recognizes the right to a divorce, to be consistent, it ought to give the parties a right to go into court, and have it adjucated in the same manner as any other right over which the courts have jurisdiction.

J. F. McCue

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Editorial Comment

Order is Heaven's First Law—Pope.

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¶ EDITORIAL POLICY:—It is the purpose of CASE AND COMMENT to voice the highest legal and ethical conceptions of the times; to act as a vehicle for the dissemination and interchange of the best thought of the members of the legal profession; to be both helpful and entertaining,—serving the attorney both in his work and in his hours of relaxation.

Edited by Asa W. Russell.

Policing the Police.

THE philosophic mayor of Greater New York not long since wrote an interesting preface to a pamphlet containing a digest of the municipal laws and ordinances for the use of patrolmen. He gave them some excellent advice as to the use of good judgment in making arrests. Mayor Gaynor's preface is as follows:

"In this digest of laws and ordinances you will see the word 'arrest' frequently used. But you now all know that you do not arrest without a warrant for small offenses unless it is quite necessary to do so. You serve a 'summons' instead as often as you can. A book of summonses will be given you with this digest. And remember you are not obliged to arrest (or summons) for every little offense. The law says you 'may' arrest without a warrant for every misdemeanor committed in your sight. It does not say you 'must.' You must use your good judgment. In the case of little batteries and rows and the like, it most often suffices to send the offenders along about their business. And in case of ordinance violations, it also often suffices for you to admonish the offender that he will be arrested or summonsed if the violation continue.

"Stay on your post, if possible. You should never leave your post with a prisoner unless it is necessary. Summon him or her instead if the offense be small. Sometimes the offender may be a stranger, and have no home or place of business. Then you may have to arrest; but not if the offense be trivial. Use your good discretion.

"To show how intelligently you are already acting along these lines, let me tell you that by using your good judgment in the way I have mentioned, and also resorting to the summons, you have already reduced the enormous number of arrests without a warrant made in the year before I became mayor, namely, 235,168, down to 132,923. And of the 235,168 boys, girls, men, and women thus arbitrarily arrested and locked up in station houses in that year, 102,257 were promptly discharged by the magistrates as having been arrested for no cause or for too trivial cause.

"Did you ever think of the amount of humiliation, suffering, and anguish caused by these unnecessary arrests, and the tendency they had to make criminals, especially of boys? You have done away with that barbarous condition in three years, and I thank you for it. And,

meanwhile, while petty politicians and corrupt newspapers have been trying to defame and degrade you, for their own ends, you have gradually worked out other great reforms.

"Remember that your chief business is to keep outward order and decency, and arrest real criminals, not good citizens guilty only of some small thing."

The foregoing figures disclose the necessity of the exercise of a reasonable discretion by our peace officers, nor is it a sufficient argument for withdrawing this power that unworthy members of the police force make the exercise of this discretion a means for extorting graft. That is a phase of the question which should be separately considered and remedied.

Every large city in the country faces problems arising from the lax enforcement of gambling, and excise laws, and those aimed at disorderly houses. The city of Cleveland is said to have solved these questions by operating under a policy laid down by the mayor. The standards they adopted were made known to everybody, and that stopped the grafting. The saloon-keeper had nothing to buy and the police nothing to sell. The result is that Cleveland is probably the most moral large city in the world.

A secret service entirely outside the police department has been found to be of value in maintaining an administrative efficiency that reduces the evil of grafting to a minimum.

Through inspectors of moral conditions in some cities, the superintendent of police is enabled to inform himself, independently of the active police force, how the laws and ordinances are being enforced by those charged with that duty.

There has been some controversy as to the necessity of establishing a special police of morals. It is said that European experience is wholly against this, for in many countries the moral policemen proved to be not at all better than those whom they were sent to watch.

A detail of police matrons might render valuable service along these lines. They would be best able to deal with girls who throng the street looking for pleasure and finding ruin. The dance halls, the parks, the excursion boats, and the moving-picture places offer as good a field as the streets. A man is always a man first, even if he is a policeman, and he might laugh at a girl when what she needed was a good talking to.

Chicago has recently placed ten patrolwomen on the regular payroll with full authority to make arrests. They were selected with special reference to juvenile protective work.

Philadelphia has established a training school for its police department. Systematic drilling and setting up exercises are producing a noticeable improvement in the *personnel* of the force. Each class consists of one man from each station house, forty in all. They are detached from other duty for two weeks while undergoing instruction and training in every branch of police duty. An important feature of the instruction will be first aid to the injured. The aim is to produce a body of officers who will not fail in their duty, whatever the emergency.

Everybody ought to realize by now that the modern policeman should be an expert, and that if the profession is put upon a scientific basis, the training of men approximating the skill of Sherlock Holmes will not be an idle dream.

Conference of Judges.

THE forty-eight chief justices of the several states and the nine presiding circuit judges of the United States circuit courts of appeals, excepting three or four absentees, made up the "Conference of Judges," held at Montreal in connection with the meeting of the American Bar Association. It was admittedly one of the most unique and distinguished audiences ever assembled. It was the first attempt to bring together all the chief justices. It was the first "Conference of Judges" ever held in the history of the United States. The prediction was made that it would mean to interstate judicial relations what the famous Mt. Vernon Conference, held in 1785 between Virginia and Maryland, meant to interstate commerce relations.

Its object, as set forth by Honorable

Thomas W. Shelton, of Virginia, who called the Conference to order and presided, is to bring about uniformity in court procedure and closer relations amongst the courts of the states. Mr. Shelton has been laboring for years to this end. "There is," said he, "no more excuse for differing court procedure amongst the states than for the use of differing languages."

He earnestly advocated "a fixed system of interstate judicial relations," declaring that it ought to be quite as possible and even less difficult than the present plan of interstate commerce relations. Instead of thousands of merchants, manufacturers, and bankers, and hundreds of railroads and other human endeavors creating difficult complications to solve, there would be forty-eight supreme appellate courts and nine Federal circuit courts of appeals to agree upon any given principle. "True it is," declared the speaker, "that by fundamental law there must be fixed interstate relations; but equally true it is that by unselfish patriotism untarnished by local pride, there may be fixed interstate judicial relations." "At heart we are one; a truth that would be promptly demonstrated in the presence of a common enemy or other peril. Why not in response to reason, if not necessity? We need a little more friendly gossiping by the judges over the back fences." He declared that the loyalty of the great majority of the people once convinced of the good intention of government is one of the most indestructible, comforting, and dependable things next to religion. "State lines," said he, "have been ignored within the last year in the enthusiastic effort to simplify and cheapen the procedure of the courts. The chief justices of the states have come with the highest honor a state can give them to aid and advise." "It has been long since apparent," said he, "that unless judicial procedure was reformed by the bench and bar it would be attempted by persons more selfish than patriotic."

Exemplary Damages for Injuries.

The collision on the New York and New Haven railroad near New Haven in August, causing the loss of more than a score of lives and personal injuries to a greater number of passengers prompted the making of some estimates in the newspapers of the probable total expense of the disaster to the company, and incidentally involved consideration of the legal measure of damages recoverable. Exemplary damages for death by wrongful act are nowhere recoverable unless a statute so provides, and there is no such statute in Connecticut. The conditions upon which exemplary damages may be assessed against masters for injuries (not resulting in death) caused by the tortious conduct of servants are explained with great clearness in Labatt on Master and Servant (§§ 2553–2563) published a month ago. As there shown, Connecticut is one of the several states where "the rule of exceptional liability," as Labatt terms it, has been adopted. This rule, which also obtains in the United States Supreme Court and consequently in all federal courts, and is especially favorable to corporations, protects a master from liability to exemplary damages except in cases where the master in some way *participated* in the servant's misconduct. Culpable participation of the railroad company in the negligence of its servants in connection with the accident near New Haven, by reason of its reckless system of train management, thus making it amenable to exemplary damages, may or may not be provable. But in so far as a jury can be convinced that a plaintiff passenger's injuries were due to the neglect of the company to provide steel instead of wooden cars, *and that this neglect was gross and wanton*, there seems to be no doubt that punitive damages may be awarded against the company as for its own wrong. Many pertinent cases are cited in sections 2558, 2559, of Labatt's elaborate treatise.

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Correspondence

Would Stand a Raise.

Editor CASE AND COMMENT:

I have really forgotten your offer, but here goes with a check for $2, and if that does not satisfy the demands of the law, cite me into court. In fact I am like the friend of mine who went to board with a meek, inoffensive little widow, and as days rolled into weeks and no money was forthcoming, she finally plucked up courage enough to say to him one morning that beef and potatoes had taken a rise; that she found it very hard to conduct her hotel, owing to the slowness of pay of many of her boarders; that she would be compelled to raise the price of board. Jim affected a lot of indignation and stormed around, politely abused the cooking, dilated upon the ungratefulness of the world and of hotel keepers in particular, and finally said he would take the matter under consideration. Days grew into weeks again, and finally the little widow, in a fit of desperation, with stacks of unpaid bills before her, went to Jim and said: "I must have your decision in this matter at once." Jim said: "Well, madam, I have given your proposal to raise the price of board very thoughtful consideration, and after due deliberation I have concluded to stand the raise."

So I feel that if the two bucks are not enough, I will try to stand the raise.

Seriously speaking, CASE AND COMMENT is all right, and the special number idea meets with my most hearty approval.

Very truly yours,

Frank W. Hooper, District Attorney.

Yreka, Cal.

Death of Drawer as Revocation of Check.

Editor CASE AND COMMENT:

In discussing in the August number, page 207, the subject of whether or not the drawing and delivery of a check operates as an assignment *pro tanto* of the fund drawn against, you include Virginia in those jurisdictions which adhere to the general rule that such drawing and delivery does not operate as an assignment unless accepted by the drawee, and you further say that the rule is accordingly clear that the death of the drawer before acceptance will operate as a revocation of the check.

I beg to call your attention to a statute of this State (Acts 1898, page 395), providing that "the death of a drawer of a check shall not, as to checks presented for payment within two weeks from the date of such death, operate as a revocation of the authority of the bank or banker upon which it is drawn to pay it. Such bank or banker shall retain for a period of two weeks after notice of the death of a depositor any moneys standing upon its or his books to the credit of such depositor, and after paying thereout any checks which may be presented within said period of two weeks shall, upon demand, pay the residue to the persons entitled thereto in the manner prescribed by law."

The statute was modeled after the Massachusetts law and has met with great favor here, both in the interest of the payees of checks and of the drawee banks, both of whom are protected against what was otherwise a harsh rule. Many of the large commercial States of the Union have not enacted legislation upon this point and I commend it to the attention of their respective legislatures, but more especially to that of their banks and bankers.

George Bryan.

Richmond, Va.

Let us consider the reason of the case. For nothing is law that is not reason.—Sir John Powell.

Arbitration — order of court — withdrawal. When the court, in setting aside an award, directs the case to be referred back to the arbitrators for another award, it is held in the Washington case of McCann v. Alaska Lumber Co. 128 Pac. 663, annotated in 43 L.R.A.(N.S.) 711, that neither party can afterward withdraw from the arbitration without consent of the court.

Bankruptcy — action for libel — duty to schedule. A claim for damages, based on slander or libel, is held in the Louisiana case of Irion v. Knapp, 60 So. 719, to be a peculiarly personal action, which is nonassignable, therefore nonenforceable by a trustee in bankruptcy, and so it need not be placed on the schedule of a petitioner in bankruptcy. Moreover, the claim is not included as one assignable under the terms of the bankrupt act.

The English and American cases as to what rights of action for tort for an injury to the person, other than a physical one, pass to a trustee in bankruptcy as assets, may be found in the note which accompanies the foregoing decision in 43 L.R.A.(N.S.) 940.

Bills and notes — presently due — interest. That a note made payable "one day after date . . . without interest," properly construed, and to effectuate the evident intent of the parties, will begin to bear interest only from the time payment is demanded, or suit is brought thereon, is held in the West Virginia case of Peirpoint v. Peirpoint, 76 S. E. 848.

The real ground for the holding is that the parties to a contract payable one day after date must have intended immunity from interest to cover more than one day.

The cases discussing the question as to when an instrument drawn "without interest" begins to draw interest are gathered in the note accompanying the foregoing decision in 43 L.R.A.(N.S.) 783.

Bills and notes — several obligors — rebate — fraud — effect. Where several persons, for the purpose of buying a horse, mutually agree to pay a certain price for him, a secret agreement between the vender and one of them, whereby he received his share in the horse for nothing for securing the others to join with him in the purchase, is held in the Oklahoma case of Noble v. Fox, 128 Pac. 102, to be such a fraud as will entitle defendants to defeat recovery on the notes evidencing their promise to pay the purchase money.

The effect of a secret advantage to one of several joint purchasers is discussed in the note appended to the foregoing decision in 43 L.R.A.(N.S.) 933.

Broker — right to delegate authority. The vocation of a real estate broker is

generally deemed to be a high, honorable, and responsible one, and one in which much prudence, discretion, judgment, and knowledge of business and human nature are required, and it involves something higher than the mere exercise of clerical or ministerial duties.

A real estate agent or broker is generally regarded as having been selected because of presumed special skill and discretion, and because of the confidence reposed in him by the owner of the property, and, accordingly, such agent or broker, unless expressly or impliedly so authorized, is generally held to be without power to substitute another agent for himself, or to delegate his authority, so far as it is discretionary, to another. *Delegatus non potest delegare.*

So, it is held in the Arkansas case of Sims v. St. John, 152 S. W. 284, annotated in 43 L.R.A.(N.S.) 796, that a real estate broker employed to sell land located near the place of his residence has no implied authority to employ a subagent, so as to entitle the latter to a commission from the owner in case he finds a purchaser.

Carrier — exclusion of passengers — former misconduct. The right of a carrier to reject one as a passenger because of bad character or previous misconduct has been passed upon in but comparatively few cases. The conclusion from those cases seems to be that neither bad character nor previous misconduct will in itself justify such rejection, unless under the circumstances there is reasonable ground to apprehend misconduct on the occasion in question. In some instances it seems that reasonable ground for apprehending such misconduct may be found in the character or the reputation of the person alone.

That one presenting himself for passage on the boat of a common carrier had, on a previous occasion, been guilty of misconduct on the boat, in being drunk and disorderly, is held in Reasor v. Paducah & I. Ferry Co. 152 Ky. 220, 153 S. W. 222, annotated in 43 L.R.A. (N.S.) 820, not to justify his exclusion from the boat if at the time he presents himself he is sober, and he is conducting himself in a decent and orderly manner.

Carrier — purchase of ticket — passenger. One upon the premises of a railroad company to purchase a ticket for passage over its lines on a train scheduled to depart eight hours later, intending in the meantime to remain in the city of purchase, and not upon the premises of the company, and therefore not under its care or control, is held in the West Virginia case of Kidwell v. Chesapeake & O. R. Co. 77 S. E. 285, annotated in 43 L.R.A.(N.S.) 999, not to be a "passenger," within the proper meaning of the term.

As a general rule, sustained by the great weight of authority, a person coming to a railroad station with the intention of taking the next train is, in contemplation of law, a passenger, provided his coming is within a reasonable time before the departure of the train.

It is not necessary that the intending passenger should have purchased his ticket. It is his coming to the station within a reasonable time before the train's departure that creates the relation of passenger and carrier. But the purchase of the ticket would probably be the highest evidence of his intention to become a passenger.

Commerce — white slave law — validity. That Congress, in the exercise of its power to regulate commerce, could lawfully enact the provisions of the white slave act of June 25, 1910, making criminal the transportation of women or girls in interstate commerce for the purpose of prostitution or debauchery, or other immoral purposes, or the obtaining, aiding, or inducing of such transportation, is held in Hoke v. United States, 227 U. S. 308, 57 L. ed. —, Adv. S. U. S. 1912, p. 281, 33 Sup. Ct. Rep. 281, 43 L.R.A. (N.S.) 906. The act, and the decision upholding its constitutionality, afford another illustration of the broader conception of the commerce clause of the Federal Constitution, and of its practical effect to enable Congress to deal with conditions which formerly would have been regarded as the exclusive province of the state legislatures.

Corporation — contract to purchase stock — assignability. That a contract to

purchase its own stock from a corporation is not assignable is held in Re Holyoke, 151 Wis. 551, 139 N. W. 392.

This question has received consideration in very few reported cases, and these differ in their conclusions as appears by the note appended to the foregoing decision in 43 L.R.A.(N.S.) 790.

Corporation — insurance — capital — subscriptions at premium. A statute requiring a paid-up, unimpaired cash capital of a certain amount to enable an insurance company to do business in the state, is held in the Oregon case of Union P. L. Ins. Co. v. Ferguson, 129 Pac. 529, 130 Pac. 978, 43 L.R.A.(N.S.) 958, not complied with by the realization of the prescribed amount by the sale of stock at a premium, but the entire amount of stock appraised at par must be subscribed and paid for.

This seems to be a case of first impression as to the right to compute the premium paid for stocks in a corporation as part of the capital stock for the purpose of determining whether the requisite amount has been paid in.

Corporation — mine — right to inspect. That a stockholder of a mining corporation has a right to inspect its mines for a legitimate purpose upon good cause shown, is held in Hobbs v. Tom Reed Gold Mines Co. 164 Cal. 497, 129 Pac. 781, 43 L.R.A.(N.S.) 1112.

The question as to the right of a stockholder to inspect property of the corporation is novel, and this decision seems to be one of first impression.

Constitutional law — assignment of wages — infringement of contract rights. That no constitutional right to contract is infringed by requiring assignments of future wages to secure small loans to be accepted by employers in writing, consented to by the wives of the employees, and recorded, to be enforceable, is determined in Mutual Loan Co. v. Martell, 200 Mass. 482, 86 N. E. 916, annotated in 43 L.R.A.(N.S.) 746.

This decision has been affirmed by the United States Supreme Court (Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 Sup. Ct. Rep. 74). The statute was attacked in the latter court as contrary to due process of law and as denying the equal protection of the laws. In discussing the statute as an exercise of the police power, the Federal Supreme Court said: "We cannot say, therefore, that the statute as a police regulation is arbitrary and unreasonable, and not designed to accomplish a legitimate public purpose. We certainly cannot oppose to the legislation our notions of its necessity, and we have expressed 'the propriety of referring to the tribunals on the spot.' Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 365, 54 L. ed. 515, 518, 30 Sup. Ct. Rep. 301." The court said that, considering the Massachusetts statute strictly as a limitation on the power to contract, it must still be held valid, referring in this connection to the case of Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1, upholding a statute requiring the redemption in cash of any store orders or other evidence of indebtedness issued by employers in payment of wages due to employees.

In answer to the attack on the act because of the exemption from its provisions of certain banking and loan companies, the court said: "We have declared so often the wide range of discretion which the legislature possesses in classifying the objects of its legislation that we may be excused from a citation of the cases. We shall only repeat that the classification need not be scientific nor logically appropriate, and if not palpably arbitrary, and is uniform within the class, it is within such discretion. The legislation under review was directed at certain evils which had arisen, and the legislature, considering them and from whence they arose, might have thought or discerned that they could not or would not arise from a greater freedom to the institutions mentioned than to individuals. This was the view that the supreme judicial court took, and, we think, rightly took. . . . But even if some degree of evil which the statute was intended to prevent could be ascribed to loans made by the exempted institutions, their exception would not make the law unconstitutional. Legislation may

recognize degrees of evil without being arbitrary, unreasonable, or in conflict with the equal-protection provision of the 14th Amendment to the Constitution of the United States." In this connection the court cited the case of Griffith v. Connecticut, 218 U. S. 563, 54 L. ed. 1151, 31 Sup. Ct. Rep. 132, upholding as a valid exercise of the police power a statute fixing the maximum rates of interest upon money loaned within the state to persons subject to its jurisdiction, notwithstanding a provision exempting national banks, trust companies, and pawnbrokers from its operation.

Criminal law — liability of municipality. That a municipal corporation may be prosecuted criminally for violating the provisions of a penal statute, is held in People v. Chicago, 256 Ill. 558, 100 N. E. 194, annotated in 43 L.R.A.(N.S.) 954.

This decision corresponds with the earlier decisions on the question. In the application of the doctrine, however, it is extended beyond that of any of the earlier cases, as none have applied it in the case of the violation of a general penal statute.

Damages — breach of promise — seduction. There seems to be a decided conflict of opinion among the cases which have considered the question as to whether pregnancy, as distinguished from seduction, is an element of damages in an action for breach of a contract to marry.

The recent case of Dalrymple v. Green, 88 Kan. 673, 129 Pac. 1145, annotated in 43 L.R.A.(N.S.) 972, holds that in an action for damages for the breach of a contract of marriage, seduction may be proven and considered in aggravation of the damages.

Deed — cancelation — failure to furnish support. Failure to furnish support in accordance with a promise which becomes the consideration for a deed absolute in form is held in the Mississippi case of Dixon v. Milling, 59 So. 804, to be insufficient to support a suit for its cancelation.

The cases discussing the right to relief of a grantor in a conveyance in consideration of an agreement to support, which is broken by the grantee, are gathered in the note accompanying Dixon v. Milling in 43 L.R.A.(N.S.) 916.

Divorce — cruelty — lewd behavior. To introduce into the bedroom of an invalid wife a loose woman in an almost nude condition, coupled with lewd behavior is held in the Florida case of Hooker v. Hooker, 61 So. 121, annotated in 43 L.R.A.(N.S.) 964, to constitute extreme cruelty, under the divorce law. Though there are but few reported cases similar to Hooker v. Hooker, they are in accord with that case in holding that for a husband to bring his wife in contact with a loose character constitutes cruelty within the meaning of a statute authorizing a divorce on that ground.

Equity — accounting — tax collector. The legal relation of a tax collector toward the township which he serves in respect to tax moneys collected by him for its use is held in Franklin Twp. v. Crane, 80 N. J. Eq. 509, 85 Atl. 408, not of such a fiduciary character as to be the subject of equity jurisdiction, but is rather that of a debtor toward his creditor; and a court of equity will not entertain jurisdiction of a suit brought by the township against the collector for an accounting by him and the collection of tax moneys unlawfully appropriated or wasted by him, for the reason that adequate remedies against him to enforce such accounting and collection are available at law.

The contention that the relation of a tax collector toward the township or county is respect to tax moneys collected by him in the performance of his official duties is of such fiduciary nature as to be subject of equity jurisdiction, which was denied in the foregoing decision, finds support in an Alabama and Arkansas case which is set out in the note accompanying Franklin Twp. v. Crane, in 43 L.R.A.(N.S.) 604.

Evidence — finger prints — admissibility — witnesses. That evidence as to identity of a man seen by a witness in his room at night is admissible, its weight being for the jury, is held in People v. Jennings, 252 Ill. 534, 96 N. E. 1077, which is also authority for the following propositions:

A comparison of finger prints may be made by witnesses skilled in the art, for the purpose of identifying one accused of crime.

Witnesses who for several years have made a study of finger prints in connection with the detective bureaus, and had actual experience in identifying persons by that method, may make comparison, as experts, of finger prints in evidence for purposes of identification.

Evidence of a finger print is not rendered inadmissible because he states that prints given him for comparison were made by the same person rather than that in his opinion they were so made. So far as reported American cases are concerned, this seems to be a case of first impression, but there is an Australian case and a few Indian cases in point, which are discussed in the note accompanying the foregoing decision in 43 L.R.A.(N.S.) 1206.

Evidence — forgery — similar offenses. Upon trial of a commissioner of deeds for forgery in wilfully certifying falsely to an acknowledgment of a mortgage, evidence of other similar false certifications of mortgages by mythical persons, is held admissible in People v. Marrin, 205 N. Y. 275, 98 N. E. 474, for the purpose of showing that the offense charged was part of a scheme to defraud one who had placed money in his hands for investment, which he embezzled and for which he gave his client fictitious mortgages as pretended securities, and thereby establishing intention.

The recent cases on the admissibility of evidence of other crimes in a prosecution for forgery are appended to the foregoing decision in 43 L.R.A.(N.S.) 754, the earlier adjudications having been gathered in a note in 62 L.R.A. 193.

The general rule is well established that such evidence is not admissible. There are, however, so many exceptions recognized to the rule, that the result is that, of the cases which reach the appellate courts, those which sanction the admission of evidence of other crimes under the well-recognized exceptions far outnumber those where the admission of such evidence is held to be error under the general rule.

Fixtures — partition sale — rights of purchaser. That a sale for partition will pass title to show cases, racks, and hangers attached by the owner of the building to aid in the prosecution of his business, with the intention that they shall become permanently a part of the building, is held in Owings v. Estes, 256 Ill. 553, 100 N. E. 205, annotated in 43 L.R.A.(N.S.) 675.

The intention of the person making an annexation of a chattel to the realty is held, in the greater number of cases on this subject, to be the guiding star in the decision of the question whether or not a fixture results. And the intention is evidenced sometimes by express statements, but most often by the nature of the article, its relation to the realty, the purpose for which the realty is used, the permanency of the annexation, and the suitability of the arrangement to the needs of the maker.

Fraudulent conveyance — property purchased by wife from household allowance. The creditors of a man are held in Ford Lumber & Mfg. Co. v. Curd, 150 Ky. 738, 150 S. W. 991, annotated in 43 L.R.A.(N.S.) 685, not entitled to reach a home purchased by his wife by means of a small down payment of her own money and weekly payments of a small sum saved by her from the husband's wages of $20 per week, which he turned over to her for the maintenance of the family, and a small additional sum received from a boarder, on the theory that the conveyance to her was fraudulent as to them.

It is the general rule that money earned or saved by the wife in managing the home of the husband and wife belongs to the husband, and, in general, property purchased by such money may be reached by creditors existing at the time of the purchase.

In Kentucky, New Jersey, Tennessee, and perhaps Missouri, there has been a change or modification of the general rule. In Iowa there seems to be a disposition in the same direction, though most, but not all, of the decisions showing that tendency could probably be sustained on other grounds.

Highway — electric line — necessity of license. That a person may build and maintain an electric line on a rural highway in order to furnish light, heat, and power to the inhabitants residing along such line without having obtained a franchise or special license from any officer, providing it is done in a way that will not seriously impede or endanger public travel, or unnecessarily interfere with the reasonable use of the highway by other members of the public, and there is no invasion of the rights of the owners of abutting lands, is held in State ex rel. Bartlett v. Weber, 88 Kan. 175, 127 Pac. 536, annotated in 43 L.R.A.(N.S.) 1033.

The rule governing this question seems to be that permission from the local authorities to construct overhead wires in a rural highway is not necessary, the extent of the power of such authorities being at most to regulate the way in which the wires shall be placed so as not to interfere with the ordinary use of the highway.

Highway — exclusive right of way — protective association. That the legislature cannot grant to a protective association organized by insurance companies to attend fires and protect persons and property, a right of way in the public streets superior to that of the citizens generally, under a Constitution providing that no exclusive privileges shall be granted except in consideration of public service, is held in Louisville R. Co. v. Louisville Fire & Life Protective Asso. 151 Ky. 644, 152 S. W. 799, annotated in 43 L.R.A.(N.S.) 600.

There are many cases where, in the course of the opinion, the court has stated that by virtue of statute, or ordinance, wagons of the fire department or police patrol, or ambulances, have the right of way in streets over other vehicles.

But only one other reported case has been found where the validity of such a statute has been passed upon, and in that case the constitutionality of a similar enactment was upheld.

Husband and wife — separation agreement — reconciliation. Reconciliation and the resumption of marital relations are held in Dennis v. Perkins, 88 Kan. 428, 129 Pac. 165, annotated in 43 L.R.A. (N.S.) 1219, not to avoid necessarily a separation agreement previously made by the parties; such effect depending on the question whether the provisions of the contract and the conduct and circumstances show an intention to treat the agreement as no longer in force.

While, as said in this case, the abrogation of a separation agreement between husband and wife is primarily a matter of intention, and reconciliation and recohabitation as man and wife do not necessarily avoid such an agreement, yet it seems that reconciliation and a resumption of the marital relation furnish such strong evidence of an intention to terminate a mere separation agreement previously entered into by the parties, that it has often been laid down and recognized as a general rule that reconciliation and a resumption of cohabitation as husband and wife do avoid such an agreement.

Insurance — credit for premium — waiver of condition as to health. Giving a specified term of credit to an applicant for life insurance for payment of the first premium is held in Connecticut General L. Ins. Co. v. Mullen, — C. C. A. —, 197 Fed. 299, to waive a provision in the policy to the effect that it shall not take effect until the first premium is paid, while the applicant is in the same condition of health as described in the application.

The recent cases dealing with the effect of a stipulation in an application or policy of life insurance, that it shall not become binding unless delivered to assured while in good health, are collected in the note accompanying the foregoing decision in 43 L.R.A.(N.S.) 725, the earlier cases having been gathered in a note in 17 L.R.A.(N.S.) 1144.

Judgment — allowance of claim in bankruptcy — conclusiveness as to validity of contract. The allowance by a bankruptcy court of a claim on contract against a corporation is held in the Alabama case of Elmore v. Henderson-Mizell Mercantile Co. 60 So. 820, to be conclusive against a plea of *ultra vires* in a subsequent suit by the same claimant against the corporation on the contract.

This decision is supported by the majority of the cases discussing the question, as appears by the note appended thereto in 43 L.R.A.(N.S.) 950.

Judgment — default — setting aside — forgetfulness. That an affidavit is not sufficient to secure the setting aside of a default judgment under a statute permitting the court to relieve one from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, which alleges that he forgot all about the action because his attention was so absorbed by devotion to important domestic and business duties and matters of public interest, without showing what they were, is held in Lovell v. Willis, 46 Mont. 581, 129 Pac. 1052.

This decision, that mere forgetfulness is not a ground for setting aside a default judgment, finds support in the reported cases which are collected in the note accompanying Lovell v. Willis, in 43 L.R.A.(N.S.) 930.

Landlord and tenant — barroom — prohibition — effect. The adoption of a prohibition law is held in the Alabama case of Greil Bros. Co. v. Mabson, 60 So. 876, 43 L.R.A.(N.S.) 664, to terminate a lease of a barroom and fixtures for occupation as a bar, and not otherwise.

For effect upon lease of property for saloon purposes of passage of prohibitory laws during the term, see notes to Heart v. East Tennessee Brewing Co. 19 L.R.A. (N.S.) 964; O'Byrne v. Henley, 23 L.R.A.(N.S.) 497; and Hecht v. Acme Coal Co. 34 L.R.A.(N.S.) 773. See also the case of Hayton v. Seattle Brewing & Malting Co. 37 L.R.A.(N.S.) 432, which holds that a lease of property permitting its use for saloon purposes in accordance with law is not nullified by the adoption of a statute forbidding further sales of liquor in the locality.

Master and servant — defective machine — injury — proximate cause. Where a shaft on an engine was broken in such a way as that an inspection would have discovered the break, and it should have been foreseen that the break would make it necessary to repair or remove the shaft while on the road, and the engine was sent out in this condition and broke down on the road, the failure to inspect and repair is held in the Oklahoma case of Chicago, R. I. & P. R. Co. v. Moore, 129 Pac. 67, 43 L.R.A.(N.S.) 701, to be the proximate cause of the injury; and the company is liable for injuries received by the fireman in attempting to repair, although it was his duty to repair while on the road in cases of emergency.

Nothwithstanding the multitude of cases involving injuries to servants received in the operation of rolling stock, a careful search has failed to disclose any other cases exactly like the foregoing decision.

Municipal corporation — supplying gas — liability. Where a city undertakes to serve both public and private convenience by maintaining a municipal lighting plant to light its streets and also furnish gas to private consumers, it is held in Brantman v. Canby, 119 Minn. 396, 138 N. W. 671, annotated in 43 L.R.A. (N.S.) 862, not to be exercising a governmental function, so as to escape responsibility for negligence in the management of such plant, whereby an injury has been caused to the person or property of an individual.

Nuisance — absence of estate in land — effect. While at common law a nuisance was regarded only as an injury to some interest in lands, Blackstone's definition being "anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another," the modern tendency seems to be to break away from so much of the common-law rule as confined redress on account of nuisances to the damage done to some interest in real property, and as gave remedy only to persons having interests in lands. So in 20 Cyc. 1152, the term "nuisance" is said to mean literally annoyance; anything which works hurt, inconvenience, or damage, or which essentially interferes with the enjoyment of life or property. There seems to be no good reason why—and it is hardly consistent with the modern idea of legal rights, wrongs, and remedies that —a child living in a house, the title to which is in his father, should not have a cause of action against one who erects

near by a nuisance which causes him great bodily injury.

This is the view of the court in the Alabama case of Hosmer v. Republic Iron & Steel Co. 60 So. 801, annotated in 43 L.R.A.(N.S.) 871, which holds that the fact that a child killed while living with its father, by noxious vapors issuing from a neighboring pond, owned no legal interest and estate in the land upon which he lived, does not destroy the right to recover damages for his death.

Physician — X-ray burn — negligence. That inflicting a burn on a patient while making an X-ray examination of him is not of itself evidence of negligence on the part of the physician, is decided in Sweeney v. Erving, 35 App. D. C. 57, which is affirmed in 228 U. S. 233, 57 L. ed. —, Adv. S. U. S. 1912, p. 416, 33 Sup. Ct. Rep. 416, which also holds that a physician to whom a patient is sent by another physician of recognized ability, for an X-ray examination, may rely on the latter's judgment as to the patient's ability to undergo the examination without harm, and is under no obligation himself to make an examination into his condition to learn that fact.

The early cases upon the question of the liability of physicians for injuries resulting from electrical or X-ray treatment are gathered in a note in 28 L.R.A. (N.S.) 262, while the more recent authorities are appended to the foregoing decision in 43 L.R.A.(N.S.) 734.

Receiver — sale — time for payment — extension. Where a public sale has been made by a receiver, in compliance with an order of the court, of property in his hands as such receiver, under notices requiring a cash payment on the day of the sale, and a bid is made within the terms of the sale, but the intending purchaser is unable to secure sufficient funds immediately with which to make such cash payment, it is held in Re Great Western Beet Sugar Co. 22 Idaho, 328, 125 Pac. 799, annotated in 43 L.R.A.(N.S.) 671, to be a reasonable exercise of discretion on the part of the district judge to extend the time within which such payment shall be made, where no injury is done to anyone by failure of the purchaser to pay at once the sum due on his bid.

Few cases have been found which consider the power of the court to extend the time for compliance with the bid. Ordinarily the question would not arise on failure to comply with such terms of sale as are to be performed immediately at the close of sale in jurisdictions where it is the duty of the conductor of the sale to resell the property immediately, that is to say, before leaving the place of sale. It would seem to be the usual practice where the master reports the delinquency to the court, for an order to be directed to the purchaser to show cause why he should not complete, and on his failing to show sufficient cause, to order that the property be resold; and there are cases holding that such an order should name a time in which the purchaser may complete. It would seem as a practical matter that the court should have power to allow completion within the time that must elapse before there can be a resale; such as the time of advertisement, etc.

Sale — agreement to supply needs — construction. Contracts to furnish such material as one may need in his business for a specified time are, by the weight of authority, held mutual and binding upon the parties, where the nature of the purchaser's business is such as to make the quantity of the article he will need subject to a reasonably accurate estimate.

A clause in a contract to furnish to a manufacturer who has been in the habit of running his plant, not to its full capacity, but merely to fill orders and keep a reasonable stock on hand, between a minimum and maximum amount of raw material, stating, "We take care of buyer's needs this year," held in T. B. Walker Mfg. Co. v. Swift, — C. C. A. —, 200 Fed. 529, not to require the furnishing of material in excess of the maximum quantity named, necessary to run the plant at full capacity, if that is in excess of orders and reasonable surplus for stock.

The earlier cases on this question were gathered in a note in 11 L.R.A.(N.S.) 713, and the subsequent authorities are appended to the foregoing decision in 43 L.R.A.(N.S.) 730.

Recent English and Canadian Decisions

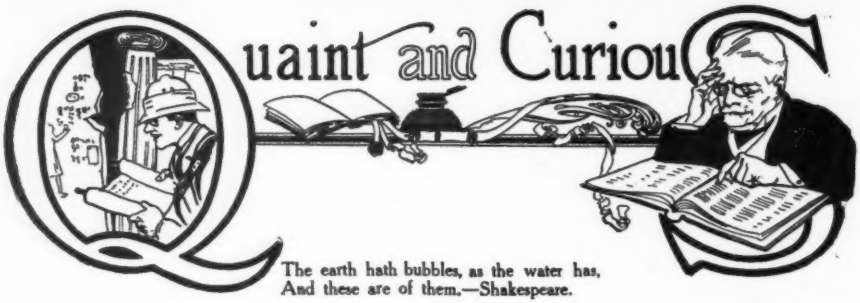
[Note.—The more important of these decisions will be reported, with full annotation, in British Ruling Cases.]

Eminent domain — compensation — value for commercial uses of land restricted by municipal by-law to residential purposes. The Ontario court of appeal has held in Re Gibson, 28 Ont. L. Rep. 20, that in determining the compensation for the taking of a 17-foot strip of land for the widening of a city street the advantage which the owner might have derived from erecting commercial buildings thereon in connection with his remaining land may be taken into consideration, notwithstanding that a by-law declares the street to be a residential one, and prohibits the erection of any buildings within 17 feet of the street line, and the by-law was enacted with a view to the possibility that the street would be widened and for the purpose of preventing buildings in the meantime being placed on the 17-foot strip, thereby increasing the amount of compensation which would have to be paid to the owner; but the value of the property must be determined with a view to the possibility or probability of repeal of the by-law.

Infants — contract — necessaries. That an agreement by an infant to join a professional billiard player in a billiard playing tour is one for his education and instruction, and so binding upon him, and enforceable against him notwithstanding it remains partly executory, where as a whole it is for his benefit, is held in Roberts v. Gray [1913] 1 K. B. 520.

Negligence — landlord and tenant — overflow of water from lavatory — malicious act of third person. That the principle enunciated in Fletcher v. Rylands, L. R. 3 H. L. 330, 37 L. J. Exch. N. S. 161, 19 L. T. N. S. 220, 6 Mor. Min. Rep. 129, that the person who, for his own purposes, brings on his land and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so is prima facie answerable for the damage which is the natural consequence of its escape, is not applicable in the case of injury to the goods of a tenant by the overflow of water from a lavatory on an upper floor controlled by the landlord, caused by the malicious act of a third person in turning on the water and plugging the waste pipe, is held by the privy council in Rickards v. Lothian [1913] A. C. 263, reversing a decision of the High Court of Australia. The privy council held that the principle does not apply for two reasons: (1) That one who maintains a dangerous agency is not liable where he shows the escape to be due to the malicious act of a third person—such conduct falling within the same category as vis major or the act of a public enemy, all of which are agencies beyond the defendant's control; (2) that not every use to which land is put brings into play the principle of Fletcher v. Rylands, but only some special use bringing with it increased danger to others; that a supply of water to the various parts of the house is a reasonable and ordinary use; and that in having on his premises such means of supply one is only using these premises in an ordinary and proper manner, and, although he is bound to exercise all reasonable care, he is not responsible for damages not due to his own default, whether that damage be caused by inevitable accident or the wrongful acts of third persons.

Perpetuities — limitation of remainder by will in manner subsequently to be determined. That the rule against perpetuities is not infringed where at the date of the instrument creating an estate its limitations are not known, but are to be determined in an indicated manner, simply because it may turn out when they are known that they infringe the rule, is held in Re Fane [1913] 1 Ch. 404, in which the question was raised by a testamentary provision creating a trust to convey a remainder to such uses as should subsist in another estate under certain deeds at the time of the death of the life tenant.



The earth hath bubbles, as the water has,
And these are of them.—Shakespeare.

A Quip Modest. Solicitor for Complainants (on redirect, after one of his clients has admitted that he allowed two years to pass without asserting any interest in the land): Now, Mr. P., did you not, during all this time, deep down in your heart, have a belief that you owned an interest in that property?

Solicitor for Respondents: We object to the question: First, on the ground that the belief of the witness is inadmissible; second, on the ground that if the belief of a witness is admitted at all, it must be a belief that is in his head, not in his heart.

Held Up Train. The Macon (Missouri) Republican tells the following interesting "yarn" about Attorney John C. Mills, of Kirksville: It is hard to think he would deliberately hold up a train, tackle the engineer, and cause him to "cough up" to the tune of $10, but it seems that he did that very thing.

"After the collision at Julesburg, on the north end of the Wabash, the legal department of the road got busy making settlements with the injured," said John C. Mills, who was attorney for the road for Schuyler county. "It became my duty to look after the injured in my county. There was a man living near the railroad track who was pretty badly hurt. At the same time he was needing some ready cash so bad that he offered to settle for $50. I jumped at that proposition and started to write a check.

"'No checks,' said the claimant; 'it's got to be cash in hand right now or I don't sign up!'

"I searched my pockets and scraped up just $40. The man wouldn't take a check for the balance; he insisted it must be cash, or the price would go up. We were far out in the country, and it was getting late. The man stood grimly pat, shaking his head. Then in the far distance I heard a toot-toot. A train was coming down the line. And how it did come! I never saw 'em run a train so fast before. But I was desperate. I got out in the middle of the track and waved my hat and handkerchief. The engineer thought I had spied a washout, and brought his panting mogul to a halt. The conductor, Dick Carter, came running up to me.

"'Say, Dick,' I said, 'I want to borrow $10.'

"'By the blood of J. Cæsar's ghost!' cried Dick; 'are you thinking this is a merry-go-round?'

"'That's all right, Dick,' I said, 'I have to have $10 right now to settle a claim that's worrying us, and you're the only friend I can lay my hands on. Shell out!'

"'Forty-five minutes late and held up like an ox team on a country road by a farmer what needs ten bucks!' murmured the conductor. 'Will somebody please twist a corkscrew in me somewhere to see if it's only a dream?'

"But at last I succeeded in convincing him of the imperative nature of my demand, and he counted out the money. Then he witnessed the signing of the release, and the train went on.

"Next time I met Dick I asked if they had kicked on his stopping the train.

"'No,' he said, 'but the next time you get hard up, I wish you'd hold up the Pullman porter; he can stand it better.'"

Levying on a Coat. "My first case was an exciting one," said Judge Dan G. Tay-

lor. "A small manufacturer employed the law firm for which I worked to recover a debt of $150, due by a merchant that had filed a rather fishy plea in bankruptcy. I was just out of college and my employers assigned me to collect the claim.

"The debtor had lots of money when he filed a petition in bankruptcy, and I learned that a few days after he had filed a petition in bankruptcy he had purchased a $600 fur overcoat, of which he was inordinately proud. We had a judgment for the $150, and I felt that our client was being treated badly by his debtor. So, resolving to stop at nothing, I determined to levy on the fur coat.

"I found out that the man was to take a certain train to New York. It was midwinter and the ground was covered with snow. I got the writ and a constable, and went to the old Union Station.

"As anticipated, the debtor appeared. We could not seize the coat while he had it on. But he took it off and laid it on his bag while he was buying a ticket.

"The constable leaped upon the coat and bag. The debtor seized him.

" 'Serve him with the writ!' I shouted.

" 'Take it out of my pocket,' cried the constable, who was busy with both hands.

"I got the writ, but the debtor was keen on the law.

" 'You are not an officer of the court,' he said; 'service by you is illegal.'

"I knew that very well. So I relieved the constable of the bag and coat and gave him the writ. The debtor then seized me and tried to wrest the property from my hands.

"I turned my back on him and kept him off. The constable, a smart fellow, took the bag, threw the coat over the same arm as held the suit case and with the other hand he served the writ.

"We left with the property. The fellow did not go to New York. He came in with the $150 next day.

"Such work is not pleasant, nor is it regarded as high practice. But every young lawyer should do it, must do it if he would be firmly grounded in the law. I shall always look back upon my justice court and collection practice as the most valuable legal training I have had."

Shortest Trial on Record. In these days of criminal trials long drawn out it may not be uninteresting to glance back at a time when, in England, at least, complaint ran in the opposite direction. Such were the earlier years of Queen Victoria, when the old Criminal Code still survived in much of its archaic barbarity, and the picturesqueness of legal procedure inadequately compensated for its cruelty. The late Lord Brampton, better known as Sir Henry Hawkins, refers in his reminiscences to the scandal of what he calls the "after-dinner" trials of that period. It was then the custom for the court to adjourn for dinner at 5 o'clock, at which meal there was no lack of conviviality, so that, when bench and bar returned to their duties, they were in no mood for protracted toil. In Lord Brampton's own words, "judges and counsel were exhilarated and business was proportionately accelerated." In confirmation of this he notes that these "after-dinner" trials did not occupy, on an average, more than four minutes apiece, and, in illustration, cites an actual case, the paltry nature of which, contrasted with the enormity of the punishment involved, throws a lurid light on the inhumanity of the times.

The case was that of a pickpocket, in which the prisoner had, inconsiderately, pleaded "not guilty," and, therefore, had a right to be heard. We may quote Lord Brampton's account, beginning with the examination of the witness for the prosecution by the prosecuting counsel.

"I think you were walking up Ludgate hill on Thursday, the 25th, about 2:30 in the afternoon, and suddenly felt a tug at your pocket and missed your handkerchief, which the constable now produces?"

"Yes, sir."

"I suppose you have nothing to ask him?" says the judge. "Next witness." Constable stands up.

"Were you following the prosecutor on the occasion when he was robbed on Ludgate hill, and did you see the prisoner put his hand into the prosecutor's pocket and take this handkerchief out of it?"

"Yes, sir."

Judge to prisoner: "Nothing to say, I suppose?" Then to the jury: "Gentlemen, I suppose you have no doubt? I have none."

Jury: "Guilty, my Lord."

Judge to prisoner: "Jones, we have met before—we shall not meet again for some time—seven years' transportation; next case."

Time: Two minutes, fifty-three seconds. As this seems to be a "record," it is only fair to add that the judge's name was Muirhouse.—New York Post.

Articles of Association of the Joy Company, Unlimited.

William Allen Wood, of the Indianapolis Bar, in Life.

Article I. Name.

The name of this association shall be The Joy Company, Unlimited.

Article II. Object.

The object of this association, in furtherance of the rights of life, liberty, and the pursuit of happiness and in the interest of good comradeship, is to promote the use of the easy chair, the stein, the soothing weed, and the story; by means of crackling logs in a broad fireplace, to incite to the geniality that knits closer the group of hearty talkers and contented listeners; to induce boisterous laughter, merry songs, lusty choruses, and strange, brave, and romantic stories; to journey in the world of imagination and, though there be snow and storm outside, to wander in green forests, to gather the blossoms of the peach and hawthorn, to hear the night birds sing, the streamlets purl, the far-off harmony of piano and voice, to gaze on stars as thick as leaves of Vallombrosa, to have fond sweethearts, and to enjoy the lunarian rights and privileges of an Italian night in June; to enjoy all these rights and privileges in their seasons; to use such nicknames, terms of affection, handclasps, and caresses as will promote good feeling and show the love and regard in which companions are held; to give words of praise and encouragement to one another, to assist one another in every way possible not inconsistent with our mutual strength and our personal sense of justice, and to foster one another's confidence in the strength of manhood and one another's hope of living up to high ideals and attaining high accomplishments; to preserve pleasant memories—the swimming pools and sand banks of our youth, the coasting hill of winter days, the Crusoes and Alices of Wonderland that whiled away our evenings, the games of ball and the athletic contests, the riding, hunting and fishing parties, the luring dances, the lyric thrills of first love, the poets that expressed for us the bright and happy colors of life and the beauties of crowded hours, and all those caressing or inspiring memories of larger experiences, deeper emotions, more vivid passions, and more intellectual avocations that make life rich, colorful, and epic in our maturity; to do all these things, and to do them before the world, so as to invite competition on the part of all mankind, that the profits of this association may be cumulative and perpetual.

Article III. Home Office.

The home office of this association shall be any place where there are a sufficient number of good fellows, two or more, to create warmth and delight by their presence.

Article IV. Capital Stock.

The capital stock of this association shall be unlimited, but an amount necessary to create an atmosphere of good cheer shall be sufficient for working capital, and shall be contributed by the members in such ways and proportions as they may see fit,—provided the total is always enough to keep the association alive,—and the profits shall be distributed according to each member's capacity to contribute and enjoy. All surplus profits shall be turned over to the world at large.

Article V. Seal.

The seal of this association shall consist of the expression of faith and love, showing through a cordial smile, and shall be used whenever it is necessary to validate any of the acts of this association or of any of its members.

Insane Man Wills Away Raptures. The last will and testament of Charles Lounsbury, who died insane in Cook County Asylum, is believed to be the

most remarkable will ever written by man. It has been heretofore published, but we reprint it in response to several requests.

"I, Charles Lounsbury, being of sound mind and disposing memory, do hereby make and publish this, my last will and testament in order as justly as may be to distribute my interest in the world among succeeding men.

"That part of my interest which is known in law and recognized in the sheep bound volumes as my property, being inconsiderable and of no account, I make no disposal of in this, my will.

"My right to live, being but a life estate, is not at my disposal, but these things excepted all else in the world I now proceed to devise and bequeath.

"Item. I give to good fathers and mothers, in trust for their children, all and every, the flowers of the fields, and the blossoms of the woods, with the right to play among them freely according to the customs of children, warning them at the same time against thistles and thorns. And I devise to children the banks of the brooks and the golden sands beneath the waters thereof, and the odors of the willows that dip therein, and the white clouds that float high over the giant trees. And I leave the children the long, long days to be merry in, in a thousand ways, and the night and the moon and the train of the Milky Way to wonder at, but subject, nevertheless, to the rights hereinafter given to lovers.

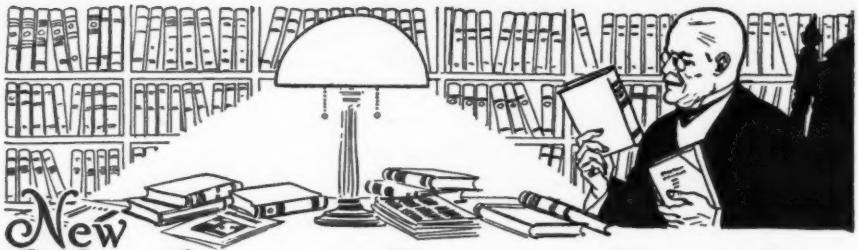
"Item. I devise jointly all the useful idle fields and commons where ball may be played; all pleasant waters where one may swim; all snow clad hills where one may coast; and all streams and ponds where one may fish, or where when grim winter comes, one may skate; to have and to hold the same for the period of their boyhood. And all meadows with the clover blossoms and butterflies thereof, the woods and their appurtenances, the squirrels and birds and echoes and strange noises, and all distant places which may be visited, together with the adventures there found. And I give to said boys each his own place at the fireside at night, with all pictures that may be seen in the burning wood, to enjoy without let or hindrance and without any encumbrance of care.

"Item. To lovers I devise their imaginary world, with whatever they may need: As the stars of the sky, the red roses by the wall; the bloom of the hawthorne; the sweet strains of music, and aught else by which they may desire to figure to each other the lastingness and beauty of their love.

"Item. To young men, jointly, I devise and bequeath all boisterous inspiring sports of rivalry, and I give to them the disdain of weakness and undaunted confidence in their own strength, though they are rude. I give them power to make lasting friendships, and of possessing companions, and to them exclusively I give all merry songs and brave choruses, to sing with lusty voices.

"Item. And to those who are no longer children or lovers, I leave memory, and I bequeath to them the volumes of poems of Burns and Shakspere and of other poets, if there be others, to the end that they may live over the old days again, freely and fully without tithe or diminution.

"Item. To our beloved ones with snowy crowns I bequeathed the happiness of old age, the love and gratitude of their children until they fall asleep."



New Books and Recent Articles

"Minimum Wage and Syndicalism." By Hon. James Boyle. (Stewart & Kidd Co., Cincinnati.) $1.00 net.

These are two great subjects which have suddenly precipitated themselves upon public opinion. There is a marked lack of popular information regarding them. While there is no existing relation between the two, they are both phases of the one overwhelming and disturbing problem of the times—the world-wide unrest and discontent with economic and social conditions. The keynote of this book is an impartial exposition, rather than an argument.

Syndicalism is foreign in origin, and aims to be ultimately international in scope. It originated in France a dozen years ago, was taken to Italy, where it flourished among the Anarchists, and came into prominence in England when its leaders assumed managerial direction of the unprecedented strikes in that country within the last three years. It was unknown in the United States, outside the inner circles of revolutionary Socialists, until the textile strikes at Lawrence, Massachusetts, last year.

The objects of Syndicalism seem to include an organization of the wage earners into industrial groups; the inculcation of a spirit of class hatred; rejection of all forms of political organization and of parliamentary action, and the denial of the legitimacy of all forms of government; indifference to reformative measures; opposition to the police and military; the habitual use of the strike with incidental destruction of property; the possession of the means of production and distribution by the wage earners and the establishment of an "industrial commonwealth."

Mr. Boyle believes that Syndicalism will leave its impress upon the prolectarian movement, but that it is doomed to extinction as a permanent force in the evolution of industrial and social economics. He apprehends that, before it has been consigned to the fate of Anarchism and Nihilism, it may bring much suffering, turmoil, and even bloodshed. He urges that the best way to obviate these disasters is to expose the true nature of Syndicalism, and to forward every sane movement for the establishment of justice and brotherly feeling between man and man.

As an acknowledged authority on International Socialism, Mr. Boyle is peculiarly qualified to expound the mysteries of this startling and new revolutionary cult.

"The Law of Decedent's Estates, Including Wills." Edited by William F. Woerner, and F. A. Wislizenus. (Little, Brown, & Co., Boston.) $4.00 net, delivered.

This is an abridgment into a single volume of Judge J. G. Woerner's monumental work on "The American Law of Administration." The editors are lecturers in the Law Departments of Washington and St. Louis Universities, upon the subjects of wills and administration of decedent's estates. In teaching this subject they found no suitable text-book for students covering this field, and conceived the idea of so condensing the main treatise as to make it of special adaptation to the needs of the beginner.

The editors have performed their work with painstaking care and skilful discrimination. The book is supplied with a copious index.

"The Conquest of Ines Ripley." By Scobe King. (The Roxbugh Publishing Co., Boston.)

This is a novel with a purpose. In a well-told story the career of a brilliant young woman, who became a believer in divorce by consent from championing the affirmative of that question in a Law School debate, is described. She meets a worthy young banker, and their affection is mutual, but for years she defers their happiness because of her aversion to enter into a marriage contract from which the law allows no escape except on proof of serious misconduct by one of the parties.

The appeal of the dying father of her lover conquered her scruples, and led her to consent to become the son's legal wife.

Said the dying man: "There is no use in trying to reform the world. We think we can do those things when we are in the vigor of life, but it's lost energy; you can only control your own actions; beyond that you cannot go, and when the Great Reaper with sickle in hand stands to sever you from this earth, as he now awaits me, your own acts,

your own conduct, will be your only consolation. The time on this earth is short at best, and the little time allotted to us here ought to be spent in creating happiness for ourselves, our immediate relatives, and friends. When we have sacrified that happiness trying to reform the world, we have spent our force in a lost cause."

The story well illustrates some of the incongruities of our divorce laws which are discussed in the article on "Divorce by Consent" in this number of CASE AND COMMENT.

"The Upas Tree." By Judge Robert McMurdy. (F. J. Schulte & Co., 607 West Jackson Boulevard, Chicago, Ill.) $1.35 net.

This is eminently a lawyer's novel, written by a distinguished member of the profession, in such a way as to especially command their interest. The hero is a lawyer who is brought to the shadow of the gallows by a network of incriminating circumstances. He is fortunate in his defender,—a venerable practitioner and the soul of integrity. The trial is described with realistic power. The book is replete with interesting legal situations, and abounds in thrilling and dramatic scenes. It presents as powerful an argument against the death penalty as probably ever was written.

It should be of special interest to New York lawyers, who are familiar with the Patrick Case, which it parallels.

"A Treatise on the Law of Elections in New York." By John G. Saxe. Flexible leather, $3.

Jones' "Commentaries on Evidence." 5 vols. Library edition, blue buckram, $33. Edition de Luxe, flexible, blue morocco, $37.50.

Bradbury's "Pleading and Practice Reports." Vol. 2. Canvas, $4.

"Cases on Sales." (American Case Book Series.) By F. C. Woodward. Buckram, $4.50.

Recent Articles of Interest to Lawyers

Aeroplanes.

"Passing of Airships over Property as Trespass."—33 Canadian Law Times, 749.

"Aerial Warfare."—33 Canadian Law Times, 741.

Annotation.

"The Annotator's Problem."—20 Case and Comment, 259.

Attorneys.

"Solicitor's Liability as Principal."—33 Canadian Law Times, 712.

"Contingent Fees."—46 Chicago Legal News, 24.

"The Commerce Lawyer."—20 Case and Comment, 245.

Banking.

"The Currency Bill and the Banks."—The Outlook, August 9, 1913, p. 794.

Bills and Notes.

"Incomplete Bills of Exchange."—34 Australian Law Times, 95.

Bonds.

"Sureties for Good Behavior."—77 Justice of the Peace, 387.

Citizenship.

"The Study of Law in Relation to Citizenship."—20 Case and Comment, 239.

Constitutional Law.

"Freedom of Contract."—38 Law Magazine and Review, 401.

Contracts.

"Oral Modifications of Contracts Required by the Statute of Frauds to Be in Writing."—77 Central Law Journal, 147.

Criminal Law.

"The Black Hand in Control in Italian New York."—The Outlook, August 16, 1913, p. 857.

"The Public the Criminal's Partner."—The Outlook, August 23, 1913, p. 895.

"Prison Reform."—38 Law Magazine and Review, 385.

Deeds.

"The Real Property Reform Bills.—III."—135 Law Times, 384.

Divorce.

"The Marital Status in South Carolina."—The Fra, September, 1913, p. 182.

Equity.

"Equity and the Common Law."—33 Canadian Law Times, 679.

Evidence.

"Hearsay Evidence—Confessions."—47 National Corporation Reporter, 9.

Foreign Countries.

"The Situation in Mexico."—The Outlook, August 30, 1913, p. 1003.

Historical.

"The Romantic Founding of Washington."—Scribner's Magazine, September, 1913, p. 319.

Injunction.

"Injunction against Prospective Nuisance."—77 Central Law Journal, 129.

International Law.

"The Monroe Doctrine in the Venezuela Dispute."—The Century Magazine, September 1913, p. 750.

"Mexico and the Monroe Doctrine."—33 Canadian Law Times, 709.

Juries.

"The Mind of the Juryman."—The Century Magazine, September, 1913, p. 711.

Law and Jurisprudence.

"The French Judicial System: Part II.—Criminal."—38 Law Magazine and Review, 428.

License.

"Distribution of Additional License Duty between Lessors and Lessees—II."—77 Justice of the Peace, 374.

Limitation of Actions.

"Statute of Limitations in Creditors' Admin-

istration Action."—34 Australian Law Times, 93.

Marriage.

"Betrothals and Marriages in Germany."—38 Law Magazine and Review, 413.

Master and Servant.

"The Federal Employers' Liability Act."—19 Virginia Law Register, 334.

"Workmen's Compensation."—46 Chicago Legal News, 14.

"Right of Government Employees in Their Inventions."—46 Chicago Legal News, 13.

"Premiums Received, Wages Insured, Accidents Reported for all Organs of Industrial Accident Insurance in France, in 1912."—46 Chicago Legal News, 32.

Monopoly.

"Trust in Stock of Corporation for Purpose of Controlling, Not Illegal."—47 National Corporation Reporter, 9.

Nuisance.

"Cesspools under the Public Health Act."—77 Justice of the Peace, 361.

Officers.

"Some Legal Questions Involved in the Impeachment of Governor Sulzer."—6 Bench and Bar, 1.

Police.

"Scientific Police."—33 Canadian Law Times, 715.

"School of Scientific Police in Rome."—33 Canadian Law Times, 721.

Practice and Procedure.

"Report of Committee on Reform of Judicial Procedure."—19 Virginia Law Register, 321.

"Summary of the Report of the Special Committee of the American Bar Association to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation."—46 Chicago Legal News, 10.

"Amendments to the New York Code of Civil Procedure in 1913."—6 Bench and Bar, 11.

Public Health.

"The Control of Disease."—The Outlook, September 6, 1913, p. 28.

"The Medical Profession and the Conservation of Health."—The Outlook, August 30, 1913, p. 996.

"The International Congress on School Hygiene."—The Outlook, September 6, 1913, p. 19.

Railroads.

"Stop, Look, Listen."—The Outlook, August 23, 1913, p. 927.

Rights.

"Positive Right."—33 Canadian Law Times, 752.

Schools.

"The Jurisdiction of the Teacher and the School Board." 20 Case and Comment, 227.

"Industrial Education."—20 Case and Comment, 233.

"Compulsory Education."—20 Case and Comment, 237.

"Compulsory Education Plus Compulsory Health Conditions."—20 Case and Comment, 240.

"School Districts under the Arkansas School Law."—20 Case and Comment, 243.

"Religious Teaching in the Public Schools." 20 Case and Comment, 249.

"Residence Essential to Entitle Child to School Privileges."—20 Case and Comment, 252.

"Use of School Buildings for Other than School Purposes."—20 Case and Comment, 255.

Trial.

"In Open Court."—77 Justice of the Peace 385.

Trusts.

"The Protection of Prodigals."—38 Law Magazine and Review, 422.

Village Green.

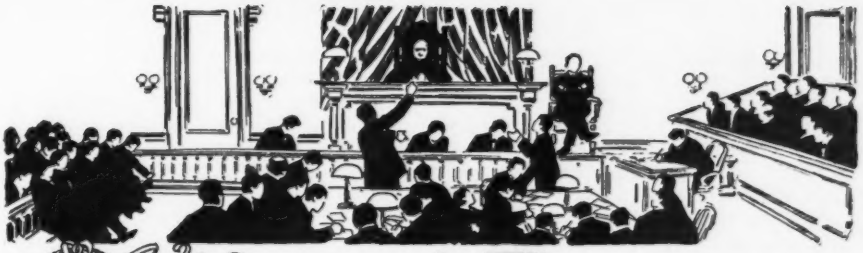
"The Village Green."—77 Justice of the Peace, 373.

Wills.

"Vested and Contingent Remainders."—20 Case and Comment, 261.

Witnesses.

"Adverse Witnesses—II."—77 Justice of the Peace, 363.



Judges and Lawyers

A Record of Bench and Bar

Meeting of American Bar Association.

PROBABLY the most notable body of lawyers ever assembled on American soil attended the sessions of the American Bar Association in Montreal during the first three days in September. The leading jurists of the United States, almost without exception, were present, as well as prominent members of the bar in Canada, England, and France.

The address delivered by the Lord High Chancellor of England, Viscount Haldane of Cloan, formed the principal feature of the opening meeting. He presented the following message from King George V.:

"I have given my Lord Chancellor permission to cross the seas, so that he may address the meeting at Montreal. I have asked him to convey from me to that great meeting of the lawyers of the United States and of Canada my best wishes for its success. I entertain the hope that the deliberations of the distinguished men of both countries who are to assemble at Montreal may add yet further to the esteem and good will which the people of the United States and of Canada and the United Kingdom have for each other."

The Lord Chancellor's theme was "Higher Nationality—A Study in Law and Ethics."

It was in many ways an epoch-making speech, dealing as it did with the relationships of three great nations.

The distinguished guest was introduced by the Chief Justice of the United States. It was a rare coincidence, one that may never occur again, that brought upon the same platform the two foremost judicial officers not only of America and the British Empire, but of the world. He dwelt on the difference between formulated law, whether civil or criminal; the moral rules enjoined by private conscience and the spirit of the community for which the English have no name, but which the Germans call "sittlichkeit." He defined this as the system of habitual or customary conduct, ethical rather than legal, which embraces all those obligations which it is "bad form" to disregard, the social penalty for which is being "cut," or looked on askance.

Enlarging on this idea, Lord Haldane advocated the development of a full international "sittlichkeit," or ethical habit among nations, as well as within nations. He recognized that its development was more hopeful in the case of nations with some special relation than within a mere aggregate of nations.

In this connection he said that recent events in Europe and the way in which the great powers had worked together to preserve the peace of Europe as if forming one community, pointed to the ethical possibilities of the group system as deserving of close study by both statesmen and students.

Lord Haldane pointed to the century of peace which has existed between the United States and the people of Canada and Great Britain, during which the peoples of these countries have come to a greater possession of common ends and ideals natural to the Anglo-Saxon group. The binding quality of this international "sittlichkeit," he declared, resulted in the fact that a vast number of

citizens would not to-day count it decent to violate the obligations which that feeling suggested.

These suggestions of the Lord Chancellor apply with peculiar force to a country such as ours, which has fallen into the habit of extravagantly estimating the possibilities of laws. We have regarded them as an infallible means of speedily reaching our ideals. We have not been content to abide by the slower processes of social discipline, or to await the gradual evolution of good usage and higher standards, but have sought "to bring Utopia by force." Lord Haldane has done well to emphasize for us the vital importance of "sittlichkeit."

President Kellogg's Address.

Mr. Kellogg, in his annual address, directed attention to the fact that this is the first meeting of the American Bar Association outside of the United States, and though in a foreign country it is among people allied to us by every tie that binds nations in a common brotherhood. He said that the constitution of the association requires its president in his annual address to review notable changes in the statute law. He accordingly selected for the specific subject the "Treaty-Making Power," particularly in its relation to the controversy aroused by the recent alien land law of California, which became a law May 19, 1913.

This law discriminates between aliens eligible and those not eligible to citizenship, permitting the former to posssess, enjoy, transmit, and inherit real property in the same manner as citizens, and limiting those not eligible to citizenship to the rights extended to them by treaty with the government of the United States. Mr. Kellogg said that the question raised by the controversy over this law, which has received such wide discussion, is whether or not a state may, in violation of a treaty of the United States, regulate the ownership of real estate within its borders by citizens of a foreign country. Speaking of the California law he said:

"If citizens of Japan have any right to own real estate in California it is difficult to see how this law takes away such right, because it provides in substance that such aliens may acquire, possess, enjoy, and transfer real estate in the manner and to the extent and for the purposes prescribed by any treaty."

Mr. Kellogg said that it was understood, however, by the public generally that California claims the right to legislate in respect to land held by aliens, notwithstanding any treaty provisions with the Federal government.

He asserted that the question thus raised is one of vital importance to the United States in its relation to foreign governments, and that he is convinced that there is no serious doubt that the Federal government may by treaty define the status of a foreign citizen within the states, the places where he may travel, the business in which he may engage and the property he may own, both real and personal, and the devolution of such property upon his death.

Mr. Kellogg referred at length to the conclusive interpretations of the treaty making power by the Supreme Court of the United States. He asserted that that court, fully realizing its grave responsibility, has established beyond peradventure the supremacy of the treaties over the laws of the states, and has enforced the rights of foreign citizens in the face of popular prejudice.

Mr. Kellogg commented, however, upon the uniform refusal of Congress to provide legislation to punish violations of treaty rights. He said that Presidents Harrison, McKinley, Roosevelt, and Taft each urged upon Congress the passage of a statute conferring on the Federal courts jurisdiction to punish violations of Federal treaties by citizens of the various states, but to the present time Congress has not acted. He said:

"But the faith and honor of the nation are pledged to their enforcement, and it is as much the duty of Congress to enact legislation to carry into effect these provisions of our treaties as it is to appropriate money and enact other legislation which Congress has always done to carry out the provisions of our international agreements.

"The result has been that the only recourse foreign nations have had, has been to demand indemnity for such injuries, which this government has always

recognized and paid. No nation claiming the high prerogative of the treaty making power has a right to shield itself behind the claim that one of the constituent states of the Union has violated the treaty, and that the central government has no authority to redress the grievance."

Bureau of Comparative Law.

Governor Simeon E. Baldwin, in his annual address as director of the Bureau of Comparative Law, gave a review of the year's advance in law and government. In speaking of eugenics he said:

"Pennsylvania passed an act this year (approved July 24, 1913), prohibiting the issue of a marriage license to any person who has been an inmate of a county asylum or home for indigent persons, unless it appears that the applicant can now support himself. The application must also state that the person making it has no disease of a transmissible character.

"A day later Wisconsin pushed a step further and made it a condition of marriage licenses that medical certificates of the good health of the parties shall be first filed.

"Michigan has enacted, this year, a statute allowing the authorities of penal and charitable institutions, supported in whole or part at public expense, to perform such a surgical operation as may best prevent procreation upon mentally defective or insane inmates. A careful *ex parte* inquiry is first to be made in each case, and no such action can be taken without the recommendation of two expert physicians. No notice to the person to be operated on is provided for.

"In Indiana, where the first statute of this kind was passed, the consent of the subject has generally, if not always, been asked and obtained. In Connecticut, where there has been similar legislation, for some years, the attorney general has given an opinion that it is not unconstitutional, although no notice to the person to be operated upon is provided for at any stage of the proceedings. No operations have, however, been thus far ordered in that state, though at least one inmate of the state prison has expressed his willingness to submit to one.

Concerning aviation he remarked:

"In August, 1912, the prefect of police in Paris signed an ordinance, pursuant to Article 11 of the ministerial decree of November 18, 1911, respecting aerial navigation. This forbids any landing in Paris, and in any commune in the department of the Seine within 500 meters of its center of population, unless in a regularly authorized aviation field. Air ships cannot fly over either a city or a commune except at a height permitting, in case of accident, a volplane descent in a sparsely populated quarter.

In May, 1913, the first arrest was made of a foreigner entering Great Britain by air ship, without previous notice to the government, and traversing prohibited areas of territory, in violation of the regulations made by the home secretary. The landing was made near London, after a flight of 450 miles from Bremen.

"The penalty in such cases may extend to six months in jail and a fine of $1,000.

"The amendatory aerial navigation act of 1913, under which the regulations were issued by the secretary, allows shooting, after three prescribed signals of warning, at any air craft which are being flown over forts, arsenals, or dockyards, in contravention of its provisions, though they may belong to citizens of a friendly power. The signals are smoke by day, and rockets or flashlights at night. Special coast guns for this kind of shooting have been ordered by the government.

"Military air craft cannot visit England, except by the direct permission of the government. Other air ships can, on getting clearance papers from the British consul at or near the place of departure.

"The *Comité Directeur* of the *Comité Juridique International de l'Aviation* will recommend to its general conference, to be held in Frankfort-on-the-Main this month, the adoption in principle of the British regulations, and further of a rule of absolute liability for all acts causing injury to others, done in navigating the air, due consideration being given to contributory participation or negligence."

As to compensation for imprisonment of the innocent he said:

"Wisconsin had adopted a law (chapter 189, Laws of 1913) for compensating persons wrongfully convicted, who have been imprisoned under the judgment. Any prisoner released on that ground can apply to a board created for the purpose for an award of damages against the state. Not over $1,500 for each year of imprisonment, or $5,000 in all, can be recovered, but if justice demands more the board may recommend a special legislative appropriation for the balance so left unsatisfied. No award can be made unless on evidence or circumstances arising or discovered after the conviction, but proof is not required (as in petitions for a new trial) that the newly discovered evidence could have been discovered before the conviction by the use of reasonable diligence.

"The work of the year in the field of law reflects the general movement of the age towards the establishment, on broader foundations, of what, for want of a better name, we call social justice. Some of our legislation may have gone too far in this respect. If so, time will correct it as surely as it will approve the rest."

Association of American Law Schools.

The Association of American Law Schools held its thirteenth annual meeting, at which Edson R. Sunderland, of the University of Michigan, delivered an address on the subject of "The Teaching of Practice and Procedure in Law Schools."

"Criticism of law, the courts, and the legal profession is one of the popular customs of the day," he said. "The public have become convinced that there is gross inefficiency in the administration of the law. It has weighed current procedure in the balance and found it wanting. There is too much delay, expense and uncertainty about it. It does not produce results commensurate with the efforts employed."

The causes for this popular attitude, he continued, were that too little regard was paid to the finer ethical standards of the processes of the law.

"No legislation can reach this problem," he asserted: "It is essentially ethical and the solution lies with the bench and bar."

He besought the members of the legal profession to take procedure more seriously. The law schools, he said, never had taken hold of procedure in a thorough-going and comprehensive way. He advocated particularly the introduction of practice courts in law schools and a broadening of curricula to include both civil and criminal pleading, evidence, trial practice and appellate procedure.

Legal Education.

In his address as president of the section of legal education, Walter George Smith said in part:

"If the bar is to overcome the rapidly rising tide of popular reprobation, it must show that the aspersions cast upon it as a body are unfounded, and, when the occasional case of unworthy conduct appears among its members, be swift to visit the offender with severe punishment. It has been truly said that the lawyer's most valuable asset is his reputation among his own brethren. In no other profession do adventitious circumstances count for so little. The only aristocracy among lawyers is that of learning, intellect, and character. Possessing them, one can aspire to the highest honors of the law; without them, neither birth nor wealth can avail.

"With such faculties as American Law Schools now possess, we need have no fear that, together with the best technical teaching, every effort will be made to impress the students with noble professional ideals. The misfortune is that, with the mixed character of our population and the steady influx of races that have none of the traditions that centuries have handed on to those who have inherited our ancient ideals of private and public honor, men will continue to come to the bar, to whom the ethical appeal based on the supernatural sanction, which is at the foundation of all true civilization, will be meaningless. Against this danger, both before and after admission, we should do all in our power."

Inns of Court.

A paper was read by Wilfrid Bovey,

of the Montreal Bar, on "The Control Exercised by the Inns of Court over Admission to the Bar in England."

Character of Applicants for Admission to the Bar.

Clarence A. Lightner, of the Michigan Bar, in his address on "A More Complete Inquiry into the Moral Character of Applicants for Admission to the Bar," said in part:

"If admission to the bar were a privilege to be bestowed upon a limited number of men especially fitted for the office, the work of the character committee would be comparatively simple, but at the present time the public, notwithstanding judicial opinions to the contrary, regards the profession as a right to which any citizen is entitled, unless it be shown that he is not qualified.

"It results therefrom that the exclusion of an applicant for general unfitness, when no specific criminal or immoral act can be proven, brings serious and often intemperate criticism upon the action of the committee, and this public criticism cannot fail to affect, more or less, the good results of the committee's work.

"Perhaps, at this time, it may not be practicable, may not be wise, to refuse admission to an applicant on other grounds than those that would justify his disbarment, if already admitted. Consider, however, what a long step forward even this standard would mark.

"Doubtless, after the bar and the public have come to appreciate the beneficial results of the effective application of this standard, they will approve of the exclusion from practice of applicants on grounds of general lack of character."

Reports of Committees.

The committee on commercial law reported, recommending an indorsement of the Pomerene bill on uniform bills of lading in interstate and foreign commerce, and opposing any attempt to repeal the national bankruptcy act. The committee on jurisprudence and law reform disapproved a resolution calling upon the association to condemn the use of the so-called "third degree" in criminal prosecutions. The committee also reported its opposition to a proposition to abolish the life tenure of Federal judges, and declared its belief that the present method of selecting such judges by Federal appointment was the best.

A report favoring the establishment of reference and bill-drafting departments in connection with state and national legislatures was received from the special committee appointed to investigate this subject. The committee on suggesting remedies and formulating proposed laws to prevent delays and unnecessary cost of litigation called the attention of the association to several bills now in Congress, and asked that their passage be urged.

On account of the many larger problems before the present national administration, the committee on compensation of the Federal judiciary reported that it had not seemed wise to introduce any legislation into the present Congress. It is reported, however, that a careful investigation had convinced it that favorable legislation may be carried through soon.

The committee on uniform state laws submitted a so-called "marriage evasion act," which in substance seeks to prevent persons from evading the marriage laws of their own states by marrying in other states. A special report by a committee appointed at the last meeting declared that public opinion was growing in favor of uniform laws for compensation for industrial accidents and their prevention. Such a law, said the report, should make compensation proportioned to the wages of the person injured. The committee on patent, trademark, and copyright law expressed disapproval of a suggestion that the commerce court constitute a United States court of patent appeal. It strongly urged the creation of a single court of last resort in patent cases, so as to obtain unity and harmony in the law.

Thomas W. Shelton, chairman of the committee on uniform judicial procedure, said in his report that "former President Taft's dream of interstate judicial relations on a basis as scientific and permanent as 'interstate commerce relations' seemed in a fair way of consummation."

Necessary legislation had been introduced in both Houses of Congress, he said, for a model Federal system on the law side of the inferior Federal courts to be prepared and promulgated by the United States Supreme Court.

Patent Law.

Frederick P. Fish spoke on patents. The speaker said that an adequate patent system gives to the inventor something that is tangible and of value, which he can transfer, in whole or in part, to the business enterprises which alone can make the invention of value to the community. The simple provision of the United States patent law that after the grant of his patent the patent owner shall control the invention absolutely for a short but definite term, having no more payments to make and no fear of interference from competitors, during the term, gives to our people a far greater stimulus to invention than does the law of any other country."

"In 1850," he continued, "the manufactures of every kind in the United States amounted to $1,019,106,616. In 1880 they had increased only to $5,369,579,191. In 1910 they had attained the enormous total of $20,672,051,870, an amount equal to one fifth of all the wealth of the United States. There is no longer room for the striking advances in agricultural machinery, machinery for making fabrics and shoes, electrical and other power apparatus, machinery employed in the production and working of wood and metals and in other great departments of industry that there was a few years ago. There should be every possible incentive to seek out and to develop an incessant series of minor improvements which may in the aggregate afford great possibilities of advancement. The latter are of a kind that especially requires encouragement, for they do not greatly appeal to the imagination, and the direct returns from any one of them are not likely to be large. They are not often developed as the result of a happy thought. Close and careful study and scientific effort, carried on persistently, systematically, and at great expense are generally required for them.

"The Oldfield bill that has been reported by the committee on patents to the House of Representatives at Washington is a most serious attack upon our patent system. It restricts the patent owner in the manufacture, use, sale, and license of patented articles, and under certain circumstances compels him to license the invention to any person or corporation that requests it. Such a requirement would check invention and the development of inventions, invade the established law of the land, and be a national misfortune."

Papers were read at the Bar Association symposium by William C. Hook, of Kansas, Judge of the Federal circuit court of appeals, eighth circuit; Judge N. Charles Burke, of the Maryland court of appeals, and William A. Blount, of Pensacola, Florida.

Judge Burke's Address.

Judge Burke's subject was, "Legal Procedure and Social Unrest."

"There is a general concurrence of opinion," he asserted, "that the rules of common law, which have heretofore governed the recovery for work accidents occurring in corporate and industrial work should be replaced by fair and effective workmen's compensation acts."

The struggle between capital and labor, he added, was responsible for new conditions calling for new laws to govern them.

"But no matter what statutes may be enacted with respect to legal procedure, if counsel are not diligent in the preparation of the case for trial, or if one side or the other is bent upon delay, it is difficult for the judge to do much."

Address of Judge Hook.

Judge Hook said that the tendency toward complicated legal procedure was not a modern one, and to prove his point cited writers of Babylon, Athens, and Rome. Although judges and lawyers always had been "the fair sport of humorous jests," in late years this feeling had taken "a more insistent and significant note," and he asked the members of his profession not to be deaf to criticism. In urging brevity and simplicity, he said:

"It is common remark that the ablest

lawyers draft the most concise pleadings, submit the briefest briefs, and make the shortest arguments. There are geniuses among them who think and act that way. They go, as it were, straight through the tangled forest, with an instinct for direction. Others reach the same end, but what a tortuous trail they leave! Acute perception bent upon the ground notes the small dispensable things. Prolixity is also the easy path for tired and uncertain minds. To a judge with whom I am most familiar it came from a disposition to pedantry. Early in his judicial career he determined that in writing opinions he would pursue the legal principles involved to their upper reaches, even to their fountain heads, and also survey the country roundabout so that, besides some little personal renown, no subsequent traveler could lose his way. He found his industry was not appreciated and that where the work went beyond the needs it was frequently inaccurate. And then one day he read of the functionaries in India who wrote "thirty page judgments on fifty rupee cases," and, the author added, "both sides perjured to the gullet." But prolixity had become almost a fastened habit.

"All candid men will agree that for reproach our criminal procedure is in a class by itself. It would be humorous were it not tragic. Some of us flatter ourselves that our procedural eccentricities are due to a tender solicitude for life and liberty, and that it is better that the many escape justice than that the one innocent suffer, forgetting the while the rational tests and standards; and that society, having its rights also, has admonished by the frequency with which it has roughly shown distrust of criminal justice judicially administered.

"All of us have heard these things, and others, in various forms. To ignore them is neither wise nor consistent with duty. To be rid of such as have real foundation would make for happiness. To the glory of the profession which has in charge so much of the temporal interests of men, the baser charge of infidelity to trust is never made against it. That is the important thing; all else are merely curios gathered on the voyage. Its members have charity, too, for they do not question the clean right of the stone throwers, as perhaps they might."

Mr. Blount's Address.

Mr. Blount, whose subject was "The Goal and Its Attainment," declared that the task of remodeling pleading and practice devolved upon the "progressive-conservatives" of the profession.

Mr. Blount observed:

"The goal," he said, "is justice, and this, in large part, inexpensively obtained." He advocated a sharp definition and separation of the functions of the court and jury, which, he said, could be obtained by special verdicts where the jury finds only the facts, and the court applies the law to those facts, and by conferring upon the courts the power to direct the jury affirmatively to find facts about which there is no reasonable dispute, thus narrowing the issues to be found by the jury.

"The effective work to be done by the bar should not be directed to endeavoring to obtain legislation correcting specific faults, but to obtain legislation giving plenary authority to the courts to cover by rules the entire domain of pleading and practice. Not only would, thus, experts do expert work, but that work would be plastic and flexible, and defects readily corrected when discovered, instead of having to await the fixed sessions of the legislature and then run the gauntlet of indifference, suspicion, neglect, and hostility.

"In view of the swift dimming of state lines by the demands of travel, commerce, and politics, the greatest good can only be reached by uniformity among the several states, so far as such uniformity may be obtainable. It would probably be Utopian to conceive that legislatures acting independently of each other, and without some ever present guide and standard would approximate uniformity in practice, but with such guide and standard, the conception may not be beyond the bounds of possibility; thus, in many states the United States chancery practice is the model for the state chancery practice, and in many is made a part of such practice by statutory adoption, and it may very readily be that

Photograph by Dudley Hoyt New York

HON. WILLIAM H. TAFT
Newly Elected President of American Bar Association

since the simplification of the United States equity rules by the Supreme Court of the United States, they will be adopted by many states having a distinctive chancery practice. And so, if there be formulated, by or under the authority of Congress, a uniform practice at law, worked out wisely and well to meet modern demands, many, if not all, of the states may substitute such practice for theirs now existing, in order that they may not have two separate systems within one jurisdiction, and that they may assimilate themselves to their sister states. A very able and zealous committee of this association has now in hand the procurement of this end, and every aid should be rendered by every member.

"Changes should be made, and systems perfected, but in and of themselves they are as useless as a puff ball or a Sodom apple. To bring to them the highest effectiveness, there must come to, and remain with, the judges and lawyers, the high conception that they are the vicars of the law; that the law is the servant of justice; that justice must be unshackled of needless forms and delays, and crystallizing their conception into a habit of professional life, they must give the lie to the charge of quaint old Charge Macklin, made more than two hundred years ago:

" 'The law is a sort of hocus pocus science, that smiles in yer face while it picks yer pocket; and the glorious uncertainty of it is of mair use to the professors than the justice of it.' "

Address of Ex-President Taft.

Ex-President William H. Taft discussed "The Selection and Tenure of Judges." He argued that judges should be appointed, instead of elected, and that they should hold office for life.

"The greater the independence of the courts," said Mr. Taft, "the stronger their influence, and the more satisfactory their jurisdiction and the administration of justice. In a popular government, the most difficult problem is to determine a satisfactory method of selecting the members of its judicial branch."

Selection of judges by appointment, he declared, did not altogether deprive the people of this right. "The selection can be really popular without resorting to an election. The chief executive elected by the people to represent them in executive work does, in appointing a judge, execute the popular will. He can search among the members of the bar and can inform himself thoroughly as to the one best qualified. Generally he has sources of information, both of an open and a confidential character, and if he is not himself a lawyer or personally familiar with the qualifications of the candidates he has an attorney general and other competent advisers to aid him in the task. For these reasons, in every country of the world, except in the cantons of Switzerland and the United States, judges are appointed, and not elected."

Mr. Taft admitted that the United States had many able judges by election; but, he pointed out, in many states the practice prevailed of re-electing good judges without contest. Any good that might have been derived from the elective system, however, promised to be lost, he asserted, with the more general adoption of the direct system.

"Like all the candidates for office to be elected under such conditions, judges," he said, "are expected to conduct their own canvass for their nomination, to pay the expenses of their own candidacy in the primary, and in so far as any special effort is to be made in favor of their nomination and election, they are to make it themselves. They are necessarily put in the attitude of supplicants before the people for preferment to judicial places. Under the convention system it happened not infrequently, for reasons I have explained, that men who were not candidates were nominated for the bench, but now in no case can the office seek the man. Nothing could more impair the quality of lawyers available as candidates or depreciate the standard of the judiciary. It has been my official duty to look into the judiciary of each state, in my search for candidates to be appointed to Federal judgeships; and I affirm without hesitation that in states where many of the elected judges in the

past have had high rank, the introduction of nomination by direct primary has distinctly injured the character of the bench for learning, courage, and ability. The nomination and election of a judge are now to be the result of his own activity and of fortuitous circumstances. Newspaper prominence plays a most important part, though founded on circumstances quite irrelevant in considering judicial qualities.

"The result of the present tendency is seen in the disgraceful exhibitions of men campaigning for the place of state supreme judge and asking votes, on the ground that their decisions will have a particular class favor."

In advocacy of a life tenure for judges, the former President said that only by this means could the judiciary be hedged around with "immunity from the temporary majority in the electorate, and from the influence of a partisan executive or legislature."

This immunity, now enjoyed by Federal judges, continued Mr. Taft, "has had some effect in making Congress grudge any betterment of the compensation to these great officers of the law. Congress has failed to recognize the increased cost of living as a reason for increasing judicial salaries, although this fact has furnished the ground for much other legislation. It has declined to conform the income of the judges to the dignity and station in life which they ought to maintain, and has kept them at so low a figure as to require from that class of lawyers who are likely to furnish the best candidates for judicial career a great pecuniary self-sacrifice in accepting appointment.

"Nothing but the life tenure of the Federal judiciary, its independence and its power of usefulness, have made it possible, with such inadequate salaries, to secure judges of a high average in learning, ability, and character.

"One of the great debts which the American people owe to Mr. Justice Hughes is the example that he set in the last presidential election, when the most serious consideration was being given to making him the candidate of the Republican party. He announced his irrevocable determination not to enter the political field because he had assumed the judicial ermine."

The Federal courts, with their life-term judges, said Mr. Taft, were the terror of evil doers. Every lawbreaker, he declared, preferred to be tried in a state court.

In conclusion Mr. Taft pointed out that if a judge appointed for life proved unworthy there was always the remedy of impeachment. He advocated, however, a change in the mode of impeachment, so as to reduce the time required of the Senate in such proceeding. He continued:

"It has been proposed that, instead of impeachment, judges should be removed by a joint resolution of the House and the Senate, in analogy to the method of removing judges in England through an address of both Houses to the King. This provision occurs in the Constitution of Massachusetts and in that of some other states, but it is very clear that this can only be justly done after full defense, hearing, and argument. Advocates of the preposterous innovation of judicial recall have relied upon the method of removal of judges as a precedent, but the reference only shows a failure on the part of those who make it to understand what the removal by address was."

Officers of American Bar Association.

At the opening session of the American Bar Association, Ex-President Taft received a deafening ovation, which was the prelude to his election by acclamation as president of the association. This is a deserved honor to one who has reflected great credit upon the great profession of the law. With the aid of the American Bar Association, he can do much to increase the activities of the State Bar Associations, and to make each a powerful agency for uplifting the standards and increasing the usefulness of the profession.

Mr. George Whitelock of Baltimore was re-elected secretary and Mr. Frederic E. Wodhams of Albany, N. Y., was re-elected treasurer.

William D. Totten

of the Seattle (Wash.) Bar.

IN 1874 the new town of Kalkaska was platted in the then wilderness of northern Michigan, a makeshift huddle of hastily erected dwellings clustered near the inevitable sawmill, the county seat of a newly organized county. But within the borders of that county there was a wealth of forest products and also opportunities for men of brawn and muscle, men with whom the world had dealt harshly, and who in this forest-environed community sought to start the world anew. It seemed an unlikely place for a youth with unusual ambition to locate. Into this backwoods hamlet such an one came from Oneida county, New York, in the year 1877, in the person of a tall youth of nineteen years. He found little in common with the aims and ambitions of the rough, sturdy, but kindly hearted people with whom he came in contact.

He occasionally wrote verses. Many of his crude poetical efforts found their way to the weekly newspapers of that period; rude, immature productions, faulty in rhyme and meter, but they were the early children of his muse, valued accordingly.

For a youth whose early years had been passed in a not particularly genteel school of experience, and bred in the atmosphere and environment of the Erie Canal boatman of that period, it indicated the trend of his thoughts and fancies. Those early efforts bore no evidence of illiteracy, for he had the rudiments of an education and the instincts of a gentleman which the more or less extended course of driving mules on the Erie Canal towpath had intensified rather than eliminated. Meanwhile the new county was developing. Clearings began to dot the wilderness. There were children to be educated. As a natural sequence schoolhouses were erected here and there, some of them reached by the merest trails through the surrounding forest by the children of the near-by pioneers. Those early temples of learning were rude and poorly equipped affairs, but they had to serve, and teachers were needed. So presently we find the subject of this sketch enrolled among the educators of his county. The salary was poor, so probably was the teaching; but this humble occupation was more in line with his tastes and ambitions, and he satisfied his employers.

While teaching school he commenced the study of the law. His legal education had its limitations. The midnight oil was burned; the legal tomes he could purchase or borrow were a pitiful equipment, but they had to answer the purpose, and he mastered them. In 1880 he was admitted to the bar.

Owing to failing health in the early 80's he visited the states of Nebraska and Kansas, in both of which he was admitted to the bar. In those days many of the old-time plainsmen and cattle men made the West a most interesting country to live in; and some of its members of the bar had been recruited from their ranks. His experience at this then frontier town and in the surrounding country gave rise to the writing of his verses, "The Lawyer Knights of Driftwood," appearing in July, 1912, CASE AND COMMENT.

In 1885 he returned to Michigan, where in 1886 he attained that stepping-stone of struggling young lawyers, the office of prosecuting attorney for his county; and after he ceased to hold that office, occasionally assisted prosecuting attorneys in neighboring counties in the trial of criminal cases. In course of time he became known as a lawyer who could be intrusted with important cases, and whose honor and integrity could be depended upon. As a skilful advocate and successful trial lawyer he was identified with many cases of state-wide importance in the circuit and supreme courts of Michigan during a period of more than twenty-years' active practice, and during a portion of the time had offices in Detroit, Michigan.

In 1900 he was elected to the legislature, where he served with credit to himself and his district, and materially widened his already extensive acquaintance, and doubtless would have been further honored, but the great West appealed to him, and in 1904 he removed with his family to Seattle, Washington.

Mr. Totten is to-day a prominent, influential, and popular member of the Seattle bar, (holding the office of United States Commissioner there). While on the shady side of fifty, he is in the prime of his physical and mental powers. Of commanding physique, he is courteous and dignified. It is a far cry from those primitive days of the 70's and the little backwoods hamlet where he scribbled his early verses and achieved his first successes as a lawyer, to these progressive strenuous times, and to the splendid metropolis of the state of Washington, and it is hard to see anything in common between the callow youth who had dreams and visions of forensic success, and the successful lawyer whose spirited poems in CASE AND COMMENT are so widely read and so universally admired.

Personally, he disclaims any distinction as a versifier, and if his modesty had prevailed this sketch would not have appeared.

Ex-Justice Henry B. Brown.

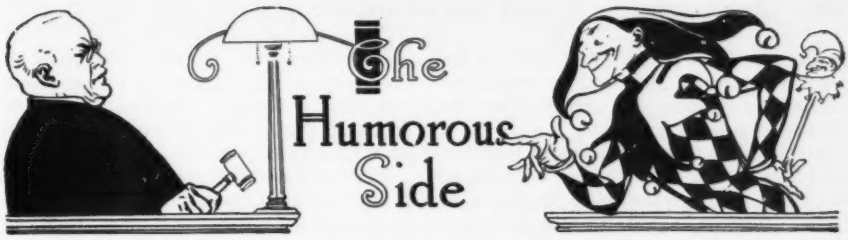
Henry Billings Brown, formerly Associate Justice of the United States Supreme Court, died on September 5. He was appointed to the Supreme bench on December 23, 1890, by President Harrison, who had practised before Mr. Brown when he was a United States Judge in Michigan.

The jurist was born in South Lee, Mass., seventy-seven years ago last March.

Justice Brown was one of the pioneers in decrying what he conceived to be the dangerous effect of the growth of wealth on popular government. He voiced the sentiment in his remarkable dissenting opinion from the income tax decision, by which the Supreme Court by one majority held the laws of 1894 to be unconstitutional.

Every office held by Justice Brown came to him by appointment. He began as a deputy United States Marshal in 1861 and later was assistant United States attorney for the eastern district of Michigan. He served a few months as a Circuit Court Judge for Wayne county, which comprises Detroit. After leaving the State bench he practised law in Detroit until 1875, when President Grant made him Federal Judge for the eastern district of Michigan. Mr. Brown was distinguished as an admiralty lawyer and as the compiler of "Brown's Admiralty Reports." He received the degree of LL. D. from the University of Michigan and from Yale. He retired from the United States Supreme bench on May 28, 1906.

While serving on the bench of the Supreme Court his sight failed him and he was advised by one of the most eminent specialists of the country that he would be totally blind for the remainder of his life. After gravely considering the matter and conferring with his colleagues on the bench Justice Brown decided that although blind it was not necessary for him to leave the bench for the time being and he accepted his infirmity with that same philosophy which has characterized his life. Months afterward with a joy that was unconcealed he told some of his friends that he believed his sight was returning. He was not disappointed, for gradually his eyes resumed their functions and in recent years he was able to recognize his friends on the street, although he seldom ventured out unattended.



A sense of humor keen enough to show a man his own absurdities, as well as those of other people, will keep him from the commission of all sins, or nearly all.

Unqualified. The newly elected county attorney ruffled his hair, and proceeded to examine the next witness.

"What is your name?" he asked.

"Pat Moran, sor," was the respectful reply.

"How do you spell it?"

"Well, well!" laughed Pat. "County attorney, an' can't spell Pat Moran!"

No Excuse. A man addicted to walking in his sleep went to bed all right one night, but when he awoke he found himself on the street in the grasp of a policeman. "Hold on," he cried. "You mustn't arrest me. I'm a somnambulist." To which the policeman replied, "I don't care what your religion is—yer can't walk the streets in yer nightshirt."

Woeful Waste. Mr. Curtner, of Warm Springs, California, had working for him a Portuguese, who was complaining about the government expending so much money for various things. He spoke something as follows:

"Mr. Curt, I very much obzheck to diz gov'ment, he spend it so much mon. He send me lots of seeds, tell'a me how to plant de seeds, how to make 'em grow, and all dat; I know more how to plant seeds and make 'em grow den dis gov'ment. And den it spended lots of mon on de lighthouse. I liv it at Half Moon Bay, where dere is a big lighthouse. De gov'ment, he spend big lots of mon to make it; den de gov'ment, he have a man thar to take care of de lighthouse; he spended lots of mon to make de lighthouse go. He blow de whistle, ringa de bell, and blowa de horn, and de fog he come in just de same.

Not Present. Considerable laughter was created yesterday among attorneys and spectators in the criminal courts in the Municipal Courts Building by a green deputy sheriff who had misunderstood the judge and was not well up on legal terms.

The judge was checking his docket, and, looking up at the sheriff, said: "What was the return on the subpœna duces tecum, Mr. Sheriff?"

All the sheriff heard was duces tecum, and, turning, he called: "Duces tecum, duces tecum, duces tecum," and then, turning to the judge, who was shaking with mirth, said in the gravest manner: "The witness does not answer, your Honor," and then he wondered why the crowd laughed.—St. Louis Globe Democrat.

The Prisoner Was "Drugged." The following incident is related of a patrolman in a city in northern Kentucky. The patrolman, recently appointed to the position, arrested a man on a charge of drunkenness one night. When placed in a cell the man seemed to be in a stupor and the jailer sent for a physician. The latter examined the prisoner and said to the jailer in a stern voice, "This man has been drugged." At this, the arresting officer turned pale and stammered, "Y-y-yes s-sir, I-I drugged him two blocks, sir, because he wouldn't walk."—Covington Post.

Levity in Court. Judge—You saw the prisoner steal the sheet of music. What happened next?

Witness—Then he walked out of the store with an abstracted air, your Honor. —Boston Transcript.

Solitaire. Phil Deitsch, who used to be chief of police in Cincinnati, was a most

astute copper. He had great faith in his detective powers, and said he could examine any suspect so closely that the truth was sure to come out.

A schoolboy who was thought to know something about a crime was brought to the office to be questioned by Deitsch. "Now, Johnnie," said the chief, "what did you do after schule?"

"I went home and played solitaire."

"Played solitary, eh," commented Deitsch.

Then he asked the boy a lot of irrelevant questions, and suddenly pounced on him with: "Now, Johnnie, who vas it you played solitary with? Quick, now."

A Solomonic Magistrate. Justice Plowden is to-day the most quoted magistrate in London. Some of his talks to the culprits that are brought before him have an oriental-like wisdom about them that suggests the Caliph Haroun al Raschid and the "Arabian Nights" entertainments. A young man and young woman were brought before him. They had been caught in the act of dancing at 1 o'clock in the morning. He looked over his glasses at the two young people and remembered the days of his youth. He then quizzed the solemn policeman, who declared that the man "Vos a-ketchin' of the young vooman haround the vaist." "Did she object?" asked the magistrate. "Hobject!" exclaimed the model policeman, "not a bit of it! She vos a partner in the hoffence." Mr. Plowden, while recognizing the danger to the British commonwealth in encouraging any expression of mirth and hilarity, drew on a long face and dismissed the culprits. "Go away," he said, with well-assumed solemnity, "go away and try to be as sad as you can."—Indianapolis News."

Cross-examination. Policeman (to tenant of flat)—And you say the rug was stolen from your hall. Can you give me any particulars?

Tenant (nervously)—Oh, yes. It was a fancy reversible rug—red on one side and green on the other.

Policeman (impressively)—Ah—and which was the green side?

The Other Way 'Round. Old lady (offering policeman a tract)—"I often think you poor policemen run such a risk of becoming bad, being so constantly mixed up with crime."

Policeman—"You needn't fear, mum. It's the criminals wot runs the risk o' becomin' saints, bein' mixed up with us."—Punch.

The Waiter's Price. It was a banquet where a notable gathering of politicians had assembled. A certain aspiring young attorney was among the number, and as he spied an influential judge at the far end of the parlor, he called the head waiter, slipped half a dollar into his hand and whispered: "Put me next to Judge Spink at the table."

Upon being seated, however, he found he was at the other end of the room from the judge.

He called the head waiter to explain.

"Well, sir," replied the official, "the fact is that the judge gave me a dollar to put you as far from him as possible."—Lippincott's.

A Hard Heart. Judge Ben B. Lindsey, of the famous Denver juvenile court, said in the course of a recent address on charity:

"Too many of us are inclined to think that, one misstep made, the boy is gone for good. Too many of us are like the cowboy.

"An itinerant preacher preached to a cowboy audience on the 'Prodigal Son.' He described the foolish prodigal's extravagance and dissipation; he described his penury and his husk-eating with the swine in the sty; he described his return, his father's loving welcome, the rejoicing and the preparation of the fatted calf.

"The preacher in his discourse noticed a cowboy staring at him very hard. He thought he had made a convert, and addressing the cowboy personally, he said from the pulpit:

" 'My dear friend, what would you have done if you had had a prodigal son returning home like that?'

" 'Me?' said the cowboy, promptly, and fiercely, 'I'd have shot the boy and raised the calf.' "—Minn. Journal.